

---

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and OREGON-WASHING-  
TON RAILROAD & NAVIGATION COM-  
PANY, a Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

---

Transcript of Record.

Upon Writ of Error to the United States District Court  
of the Western District of Washington,  
Southern Division.

---

FILED

SEP 27 1913



United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and OREGON-WASHING-  
TON RAILROAD & NAVIGATION COM-  
PANY, a Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court  
of the Western District of Washington,  
Southern Division.

---



# INDEX OF PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Complaint.....	3
Answer of Northern Pacific Railway Company.	6
Answer of Oregon-Washington Railroad & Navigation Company .....	5
Assignment of Errors .....	129
Attorneys, Names and Addresses of .....	1
Bill of Exceptions .....	10
Certificate of Clerk U. S. District Court to Transcript of Record, etc.....	144
Charge to the Jury .....	106
Citation on Writ of Error (Original).....	149
Cost Bond .....	141
Exceptions to Instructions Given .....	120
Instructions Refused .....	104
Instructions Requested by Defendant Oregon-Washington R. R. & Nav. Co.....	98
Judgment .....	9
Motion for New Trial (Grounds Thereof).....	122
Motion of Oregon-Washington R. R. & Nav. Co. for a Directed Verdict (Grounds of Motion)	97
Names and Addresses of Attorneys .....	1
Order Allowing Appeal .....	140
Order Granting New Trial .....	8
Order Settling Bill of Exceptions, etc.....	127

Index.	Page
Praeceptum for Transcript .....	2
Prayer for Reversal .....	139
Prayer for Reversal .....	151
Stipulation of Facts, etc.....	11
Supersedeas Bond .....	143
<b>TESTIMONY ON BEHALF OF PLAINTIFF:</b>	
BANKER, J. D.....	28
Cross-examination .....	31
Redirect Examination .....	32
BEGARDIS, G.....	41
DOUD, L. L. (in Rebuttal).....	95
Cross-examination.....	96
EBERT, WILLIAM.....	34
Cross-examination... ..	35
Redirect Examination.....	41
FETTIG, WILLIAM (in Rebuttal).....	93
Cross-examination.....	94
Redirect Examination.....	95
GILLMAN, W. C.....	44
HORN, JOHN.....	14
Cross-examination.....	18
Redirect Examination .....	23
Recalled.....	28
McCARTHEY, ANNA D. ....	26
Cross-examination.....	25
MENTZER, C. A.....	11
QUICK, J. W.....	43
SAVAGE, H. S. ....	32
Cross-examination.....	33
WHITEHEAD, THOMAS .....	12
Cross-examination .....	13

## Index.

Page

TESTIMONY ON BEHALF OF DEFEND-  
ANT:

BROWN, M. F. ....	47
Cross-examination .....	49
DONOVAN, J. A. ....	56
Cross-examination .....	59
Recalled. ....	81
DRISCOLL, J. J. ....	72
Cross-examination.....	75
Redirect Examination .....	76
EHLORS, HENRY .....	51
Cross-examination.....	52
GORDON, L. FRANK.....	80
GUY, M. D.....	68
Cross-examination.....	69
Redirect Examination.....	70
HOOPER, T. L.....	76
Cross-examination.....	76
LINDSAY, C. B.....	65
Cross-examination.....	67
Recross-examination... ..	68
McALEVY, GEORGE.....	60
Cross-examination... ..	61
McMAHON, M. J.....	53
Cross-examination.....	55
PERLEY, W. A.....	87
Cross-examination.....	91
Redirect Examination.....	93
PORTRUDE, G. O.....	71
Cross-examination.....	72

Index.	Page
RYAN CHARLES.....	63
Cross-examination.....	64
SAVERY, C. D.....	44
Cross-examination....	46
SHARMAN, C. P.....	70
Cross-examination....	71
WASSON, R. M.....	77
Cross-examination.....	79
Redirect Examination.....	80
Recalled.....	86
Redirect Examination.....	87
ZINTZ, FRED.....	82
Cross-examination....	84
Redirect Examination.....	86
Verdict.....	7
Verdict.....	8
Writ of Error (Original).....	146



## Names and Addresses of Attorneys.

W. H. BOGLE, Esquire, #609 Central Building,  
Seattle, Washington;

CARROLL B. GRAVES, Esquire, #609 Central  
Building, Seattle, Washington;

F. T. MERRITT, Esquire, #609 Central Building,  
Seattle, Washington; and

LAWRENCE BOGLE, Esquire, #609 Central  
Building, Seattle, Washington; and

P. C. SULLIVAN, Esquire, #1507 National Realty  
Bldg., Tacoma, Washington, and

WALTER CHRISTIAN, Esquire, #1507 National  
Realty Bldg., Tacoma, Washington,

Attorneys for Defendant and Plaintiff in  
Error Oregon-Washington Railroad &  
Navigation Co.

GEORGE T. REID, Esquire, N. P. Headquarters  
Bldg., Tacoma, Washington;

J. W. QUICK, Esquire, N. P. Headquarters Bldg.,  
Tacoma, Washington; and

L. B. DA PONTE, Esquire, N. P. Headquarters  
Bldg., Tacoma, Washington,

Attorneys for Defendant and Plaintiff in  
Error Northern Pacific Railway Com-  
pany.

CHARLES BEDFORD, Esquire, #419 Berlin  
Building, Tacoma, Washington, and

E. D. HODGE, Esquire, #419 Berlin Building, Ta-  
coma, Washington,

Attorneys for Plaintiff and Defendant in  
Error.

**Praeceptum for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following papers to constitute the transcript on appeal in the above case; the caption (excepting on the complaint), and all endorsements, verifications and acceptances of service, etc., to be omitted. Transcript to be printed pursuant to the Circuit Court of Appeals rules:

1. Amended Complaint;
2. Answer of O.-W. R. & N. Co.;
3. Answer of N. P. Ry. Co.;
4. Verdict and Interrogatory;
5. Judgment.
6. Assignments of Error;
7. Bill of Exceptions.
8. Order Settling Bill of Exceptions;
9. Order Allowing Writ of Error;
10. Cost Bond;
11. Supersedeas Bond, and
12. This Praeceptum.

SULLIVAN & CHRISTIAN,  
Attorneys for O.-W. R. & N. Co., Plaintiff in Er-  
ror.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 21, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [1\*]

---

\*Page-number appearing at foot of page of original certified Record.

*In the Circuit Court of the United States, Western  
District of Washington, Western Division.*

No. 1876.

CYRUS A. MENTZER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and OREGON-WASHING-  
TON RAILROAD & NAVIGATION COM-  
PANY, a Corporation,

Defendants.

**Amended Complaint.**

Comes now the plaintiff herein and for cause of  
action against the defendants herein alleges:

I.

That at all the times hereinafter mentioned the  
defendant Northern Pacific Railway Company was,  
and now is, a private corporation, organized and ex-  
isting under and by virtue of the laws of the State  
of <sup>WISCONSIN</sup> Washington, with offices and doing business as a  
common carrier at Tacoma, Washington.

II.

That at all the times hereinafter mentioned the  
Oregon-Washington Railroad & Navigation Com-  
pany was, and now is, a private corporation, organ-  
ized under the laws of the State of Oregon, with  
offices and doing business at Tacoma, Washington.

III.

That on or about the 15th day of July, 1911, and  
for some time prior thereto, the plaintiff was the

owner of a certain planing-mill, including machinery, and a large quantity of lumber, located at, or near South Tacoma, Washington, and adjacent to the right of way of said Northern Pacific Railway Company, said planing-mill, machinery and lumber being of the value of \$3,330.00.

## IV.

[2]

That on or about the said 15th day of July, 1911, and for some time prior thereto, the defendant Oregon-Washington Railroad & Navigation Company, was operating trains over the railroad of said defendant Northern Pacific Railway Company, and running by the property of said plaintiff hereinafter set forth.

## V.

That on or about the 15th day of July, 1911, while the trains of the defendants were running upon and over said railway of the said Northern Pacific Railway Company, and passing the property of the plaintiff, above described, one of the locomotives of the defendants was so carelessly and negligently constructed, and so carelessly and negligently operated by the servants and agents of the defendants, that sparks were emitted therefrom, which falling upon and about the building, in which the greater portion of the property of the plaintiff was located, set fire to said building and property, which fire so set spread upon and over the property of the plaintiff burning and consuming the same.

## VI.

That the loss, injury and damage resulting to the

plaintiff by reason of said fire was caused by the negligent construction of the locomotives of the defendants, and the carelessness and negligence of the servants and agents of the defendants in operating the same, and in starting said fire and permitting the same to burn the said property of the plaintiff, and by reason of said negligent acts of the defendants the plaintiff has been damaged in the sum of \$3,330.00.

Wherefore plaintiff prays judgment against the defendants in the sum of \$3,330.00 and for his costs and expenses herein.

E. D. HODGE,  
Attorney for Plaintiff.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Dec. 30, 1911. James C. Drake, Clerk. Albert P. Close, Deputy." [3]

---

**Answer of Oregon-Washington Railroad &  
Navigation Company.**

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and for answer to the complaint herein, says:

I.

It admits the allegations contained in paragraphs numbered I and II of said complaint.

II.

It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered III of said complaint.

III.

It denies each and every allegation contained in

paragraphs numbered IV, V and VI of said complaint.

Wherefore, this defendant prays that it may be dismissed and go hence, and recover from the plaintiff its costs and reasonable disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,  
Attorneys for Defendant, Oregon-Washington Railroad & Navigation Company.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Nov. 8, 1911. James C. Drake, Clerk. Albert P. Close, Deputy." [4]

---

**Answer of Northern Pacific Railway Company.**

Comes now the Northern Pacific Railway Company and for its separate answer to the amended complaint of the plaintiff alleges as follows, to wit:

I.

For answer to paragraph I, defendant admits the allegations therein contained.

II.

For answer to paragraph II, defendant admits the allegations therein contained.

III.

For answer to paragraph III, defendant alleges that it has no knowledge concerning the ownership or value of the planing-mill, machinery and lumber therein mentioned, and therefore denies the same as alleged therein, to the extent that plaintiff be required to make proof thereof.

IV.

For answer to paragraph IV, defendant admits the allegations therein contained.

V.

For answer to paragraph V, defendant denies each and every material allegation therein contained.

VI.

For answer to paragraph VI, defendant denies each and every material allegation therein contained.

WHEREFORE, this defendant prays that plaintiff take nothing by reason of his said action and that this defendant recover its costs and disbursements herein expended.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant, Northern Pacific Ry. Co.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Nov. 10, 1911. James C. Drake, Clerk. Albert P. Close, Deputy." [5]

---

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and against the Northern Pacific and Oregon-Washington Railroad & Navigation Company, and assess plaintiff's damages at the sum of Two Thousand Dollars (\$2,000.00).

H. JASPERSON,

Foreman.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Dec. 9, 1912. Frank L. Crosby, Clerk. E. C. Ellington, Deputy." [6]

**Order Granting New Trial.**

Now, on motion of the defendants herein,

IT IS ORDERED that a new trial be granted in the above-entitled action; said trial to be noted for April 15, 1913, at 10:00 A. M.

Dated February 25, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 26, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy." [7]

---

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and against the Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company, and assess plaintiff's damage at the sum of Thirty-one Hundred and Twenty Dollars (\$3,120.00).

S. A. GIBBS, Jr.,

Foreman.

**INTERROGATORY.**

Q. If your verdict is in favor of the plaintiff, state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train No. 301, or the engines of Northern Pacific freight train No. 680, or the engine of the O.-W. R. & N. freight train No. 691.

A. Fire was started by sparks from the engine of the O.-W. R. & N. frt. train No. 691.

S. A. GIBBS, Jr.,

Foreman.



[Endorsed]: "Filed U. S. District Court. Apr. 25, 1913. Frank L. Crosby, Clerk. E. C. Ellington, Deputy." [8]

---

**Judgment.**

This cause coming on to be heard upon motion of the plaintiff by his attorneys, E. D. Hodge and Charles Bedford, for judgment according to the verdict of the jury heretofore rendered and entered in this cause, and the Court finding that heretofore after the trial of said cause had been heard before the jury and said jury rendered their verdict thereon and found for the plaintiff and against the defendants Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$3,120.00, which said verdict has been duly entered herein, and that the plaintiff is now entitled to have judgment entered herein according to said verdict and his motion for judgment granted:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the plaintiff, Cyrus A. Mentzer, have and recover judgment against the defendants Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company in the sum of \$3,120.00, together with his costs and disbursements taxed and to be taxed herein.

Done in open court this 16th day of June, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jun. 17, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [9]

---

*In the District Court of the United States for the  
Western District of Washington, Southern Division.*

No. 1876—C.

CYRUS A. MENTZER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and OREGON-WASHINGTON  
RAILROAD & NAVIGATION CO., a  
Corporation,

Defendants.

**Bill of Exceptions.**

Be it remembered that heretofore on the 23d day of April, 1913, the above cause came on for trial before the Honorable E. E. Cushman, Judge, and a jury.

E. D. Hodge and Chas. Bedford appearing as attorneys and counsel for plaintiff, and J. W. Quick appearing as attorney and counsel for defendant Northern Pacific Railway Co., and Bogle, Graves, Merritt & Bogle and Sullivan & Christian appearing as attorneys and counsel for defendant Oregon-Washington Railroad & Navigation Co.

Whereupon the following proceedings were had and testimony taken, to wit:

**Stipulation [of Facts, etc.].**

It was thereupon stipulated, immediately after the jury was sworn to try the case, as follows:

It is stipulated between the plaintiff and the defendant that the block sheet of the Northern Pacific and Oregon-Washington Railroad & Navigation Company may be introduced in evidence showing the running of the trains on the morning [10] of the 15th of July, 1911, showing the arrival and departure of trains at South Tacoma stations at Lake View station, being the first station south of South Tacoma, may be received in evidence as Plaintiff's Exhibit "A."

And it is further stipulated that train 691, O. & W. was a freight train, and that train No. 301, N. P. was a passenger train, and that train 680 was a Northern Pacific freight train, being a double header, that is, propelled with two engines, and further that trains Number 691 and 301 were leaving South Tacoma for Portland going south, and that train 680 was coming from Portland to Tacoma, running north.

It is further stipulated between the said parties that the Oregon-Washington Railroad & Navigation Company was running its trains over the trackage of the Northern Pacific between Tacoma and Portland, under lease with the Northern Pacific Railway Company, a trackage agreement, the property being owned by the Northern Pacific.

**[Testimony of C. A. Mentzer, on His Own Behalf.]**

C. A. MENTZER, the plaintiff, testified as follows:

That he was the owner of the planing-mill property described in the complaint, during the times

(Testimony of C. A. Mentzer.)

mentioned in the complaint.

That the main tracks of the Northern Pacific Railway Co. were between eight and ninety feet from the building in which his planing-mill was located.

That the contour of the land in the neighborhood of the mill was slightly upgrade to a point a few hundred feet south of where the mill was, running from north to south, and higher at the south than at the north.

That all of the property described in the complaint was destroyed by fire on the 15th day of July, 1911, and that the value of the property destroyed was \$3,295.00.

**[Testimony of Thomas Whitehead, for Plaintiff.]**

THOMAS WHITEHEAD, witness for plaintiff, testified as follows:

That on or about the 15th day of July, 1911, he had charge of plaintiff's planing-plant, which was burned.

That his duties were to see that everything was working right and kept in good condition. That the place was left at [11] night in such condition that there was no fire. That in the afternoon preceding the burning of the mill he took a large hose and wet down the planing plant part.

Referring to plaintiff's identification "B," he proceeded to mark the location of plaintiff's mill in the building with a white pencil.

That he left the mill on that evening at 6 o'clock P. M.

That he wet down the mill, including the floor in and around the mill, in the middle of the afternoon,

(Testimony of Thomas Whitehead.)

and at the time he left the mill was shut down.

That precautions were always taken about the mill to prevent fires by cleaning up the shavings and sweeping them up clean, and that this was done on this afternoon and evening.

That in connection with the planing-mill was an automatic grinding machine, shafting that ran the full length of the building; also that oil was kept on hand and also a storehouse for things not in use, pulleys, belting, a cooking outfit, blacksmith's outfit and a logging outfit. All these latter being kept in a room or storehouse on the premises.

#### Cross-examination.

That there was some lumber back in behind the planer that had been taken out of the dry kiln.

That as work was done on the lumber there were shavings and dust from the lumber.

That Horn Brothers shingle-mill machinery was in the south end of the building, and that plaintiff occupied the two story part of the mill building next to the railroad track.

Horn Brothers were operating their shingle-mill on that day, sawing shingles, which created dust, and dust which would accumulate on the rafters, sills and lumber of the building, [12] wherever dust would accumulate.

That the shingle-mill was not closed down at the time they quit operating plaintiff's planing-mill.

That the building shown on plaintiff's identification "B," being the building in which plaintiff's property was situated, was open. That the mill

(Testimony of Thomas Whitehead.)

building was from ten to twelve feet high to the eaves; that to the top of the building would be about fourteen feet, except the two story part, which would be four or five feet higher.

The dry kiln was about ten feet in height on the sides.

That there was a platform in front, eight or ten feet out toward the switch of the railroad company, and that he wet that down some time in the afternoon; that the weather was very hot at this time and dry.

**[Testimony of John Horn, for Plaintiff.]**

JOHN HORN, a witness for the plaintiff, testified that on the 15th day of July, 1911, he was sawing shingles and was running a shingle-mill in the building that was destroyed; that he was there during the day preceding the fire and that he closed up at 6 o'clock at night.

There was no fire in the engine at the time the shingle-mill was closed. "We practically let it go out about six o'clock."

That the next time he saw the mill after 6 o'clock was about 8 o'clock the same evening. That there was no fire in the engine at that time. That he went about the mill at this time (8 o'clock); that he was in the boiler-room with the engineer.

That the next time he saw the mill was between 12 and 1 [13] o'clock that same night, that he went through the mill at this time. (Illustrating to the jury from the map, identification "B" above re-

(Testimony of John Horn.)

ferred to.) That he went thoroughly through the mill at this time.

That he did not notice any fires around the mill at that time.

That the next time he *was the* mill was along about 3 o'clock and that it was pretty well afire then. The fire at this time was in the high building. The biggest part of it seemed to be at a point in the roof therein. (Indicated by witness.) Near the large building on the north end.

That there was no fire at the south end of the building nor at the dry kiln.

That he had been running the shingle-mill since the 1st of January, 1910, and that he was around the mill every day.

The witness was then asked the following question: State whether or not you ever saw any other fires in this immediate neighborhood set by sparks of the engines of the defendants Northern Pacific Railway Company or Oregon-Washington Railroad & Navigation Co. at any time just prior or within thirty days prior to the burning of this mill.

To this question attorneys for the defendant Oregon-Washington Railroad & Navigation Co. objected, on the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general, and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore,

(Testimony of John Horn.)

limited, if the testimony was admissible at all to fires started by this engine, and also upon the further [14] ground that under the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Company caused by a particular engine belonging to that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an independent act of negligence on the part of the defendant Northern Pacific Railroad Company for which defendant Oregon-Washington Railroad & Navigation Co. was in no way responsible.

Thereupon the Court overruled the objection, at the same time saying: If at the end of the testimony there is nothing concerning sparks emitted and fires set by the negligence of your company, then you will be entitled to an instruction on that. The jury will understand that the statement of the law is as Mr. Sullivan outlined, and you will be instructed after the close of the case probably that even if you should find that an engine of the Northern Pacific Railway Company was negligently constructed, maintained or operated in the manner stated in the complaint, you could not find against the O. & W.; but if you find that the O. & W. engine was negligently constructed or equipped or maintained or operated, as described in the complaint, and the other elements



(Testimony of John Horn.)

in the case are present, even though you should find it was not the Northern Pacific, and that it had nothing to do with the fire, your verdict would be against both defendants because the Northern Pacific allowed the engine to be operated by another company over its tracks in a negligent manner, or one that was negligently constructed; so that you see the O. & W. will not be responsible [15] in this suit unless the setting of the fire is brought home to them and established by the preponderance of the evidence, that it was their engine and that it was either negligently equipped or operated.

To which ruling of the Court the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company and this was in the same manner overruled by the Court, to which ruling defendant Northern Pacific Railway Company excepted and the exception was allowed.

Immediately following the ruling and statement by the Court and the allowance of the exceptions as above given, the question was read by the stenographer and the answer was, "Yes, sir."

Then the following question was asked the witness: State the circumstances under which that fire occurred.

Attorneys for defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon all the ground made about the last preceding

(Testimony of John Horn.)

question above quoted. This objection was overruled by the Court and an exception was allowed the defendant, Oregon-Washington Railroad & Navigation Co.

The defendant Northern Pacific Railway Co. also made the same objections to this question and the same ruling was made by the Court and exception taken and allowed the defendant Northern Pacific Railway Company.

The answer of the witness was as follows: I have seen several. There was one set about thirty yards [16] from the mill and it was running pretty close to the fence where a private family was living, and I went over there and helped put it out, and also put one out right in the mill-yard; close to the mill, probably four or five days before. This other happened probably a couple of weeks before.

On cross-examination witness Horn testified that he was one of the firm of Horn Brothers, who owned and operated a shingle-mill in the building, and that he had a suit against these same companies to collect for the loss of the shingle-mill, but that this suit had been terminated.

That he did not remember the dates when he saw the fires, preceding the day of the burning of the mill; that it might have been two weeks before.

That one of the fires the railroad men and he went over and put out. That fire was started from a freight engine. That the sparks were going out of this freight engine and the grass was pretty dry. That he did not know what company the freight en-

(Testimony of John Horn.)

gine belonged to, but that he thought it was an Oregon and Washington. That he did not know for certain whether it was or not.

That he did not know whether it was a Northern Pacific train. And when asked if it could have been a Great Northern train he said he did not know. That he knew that the Great Northern operated its trains over the same tracks.

He was then asked if he had seen sparks come out of the engines of all of these three different roads. He answered that he did not remember; that he did not pay attention.

That there was a grade at or near the mill to the south and that when a train started up it would sometimes puff pretty hard. That this was when he saw sparks coming out of [17] some smokestacks. That the grass was very dry where the sparks lighted and they started fires. That this was about two weeks before the burning of the mill. That the next fire he saw prior to the burning of the mill property was close to the mill property, in the yard. That this was two or three days before the mill was destroyed. That he saw this fire when it was probably a yard square. That he did not know that he saw this fire started by an engine. That he saw the engine pass, hauling a freight train. That he did not remember what company it belonged to. That he did not know as he looked. That he did not know whether the Northern Pacific, Great Northern or Oregon-Washington Railroad & Navigation Company were operating this train or engine.

(Testimony of John Horn.)

Then he testified that there was no grass out there, but that it was shavings and shingles and that the season was a very dry one.

That the materials were all dry; that they burned pretty quick.

That he did not think this material would burn quite as quick as oil.

That he quit operating the shingle-mill at 6 o'clock, and that plaintiff's mill ceased to operate a few minutes before six.

There were four or five men in the shingle-mill and there was an engineer.

That sawdust was used as fuel in operating the shingle-mill and that shavings and sawdust from the planing-mill and shingle-mill were also used in the furnace.

That the fires in the furnace were out at 6 o'clock P. M.

That he went back to the mill about 8 o'clock P. M. [18]

That he most generally went back to lace a belt or something after the evening meal.

That the engineer was at the mill when he arrived.

That there was no fire in the engine or furnace at that time. That it was absolutely out. That he knew it, because he was right in front of the boiler, and he and the engineer were standing there talking, and if there had been any fire he would have known it. That this was one of the things that he looked out for after he went back after the evening meal.

(Testimony of John Horn.)

That he was positive that there was no fire at that time.

That he stayed around the mill at that time for fifteen or twenty minutes and then went home. That he lived almost opposite to the dry kiln. That he lived across Washington Street and up one block. That the mill was between the tracks and Washington Street.

That he went back to the mill between 12 and 1 o'clock at night. That he had not been to bed between the time he had been there at 8 o'clock and at 12.

That he happened to go down at midnight or after because he heard a whistle blowing. It sounded like a boiler was steaming up or something of that sort dragging along. That he got up and went down to see if there was anything down around the mill, but that he could not see anything, and finally found out that it was in the South Tacoma car shops or yards, which were across the tracks and north from the mill about three blocks. Probably a half a mile in length.

That when he heard the whistle he just kind of thought there was something wrong somewhere and got up to see. [19] That he knew there had not been any fire in the boilers at the shingle-mill and had not since 8 o'clock.

He was asked if he did not know that it could not possibly have been from his mill, and he answered that he thought he would take a walk down there any way, it kind of annoyed a fellow.

(Testimony of John Horn.)

Then he was asked if that was the only reason he had for going down to the mill, and answered that he could hear where the whistle was after he got down on the street, and to make sure he went on down; and when he got down the street close to the mill he knew then it was in the railroad yards and it was not at his mill.

Then he was asked as to why he went through the mill and he answered, "Just taking a walk through there." That after going through the mill thoroughly, he walked back home. That he saw nobody around the mill.

That he had insurance on his mill.

That he did not know just what time it was when he first saw the fire. That his wife woke him up and that he went down to the mill—hurried as fast as possible. That when he arrived there he got hold of a hose out of the corner of the boiler-room and went out towards the track. That he then stood on the track awhile until it got so hot that he could not stay there.

That he did not turn in the fire-alarm because his wife was telephoning the alarm in and when he came down Washington street he could see some one turning the alarm at the fire-alarm box. This was before he arrived at the mill. That he thought it was Mr. Sharman, a laundry-man, was the one at the fire-box. That he saw him turning in the alarm before he got to the mill. [20]

That there seemed to be plenty of light at that time, from the fire. That he thought it was not day-

(Testimony of John Horn.)

light, but was slightly dark.

That he did not think it got light for probably half an hour.

That he stood there on this side of the railroad until it was warm, and then he went around to the other side, and then the fire department was there.

That he did not go into the mill building at all.

That he did not save any of his machinery or stuff.

That he thought the fire department was pretty slow coming there.

That he did not remember seeing any trains pass at this time while he was there.

On redirect examination he testified that he was trying to throw water on the fire for 5, 10 or 15 minutes, and then went around to the other side.

**[Testimony of Anna D. McCarthey, for Plaintiff.]**

ANNA D. McCARTHEY testified as a witness, on behalf of plaintiff, as follows:

That on or about the 15th day of July, 1911, she was at home, 58th and Hood Streets, Tacoma. That her home was just across the street from the mill; exactly opposite.

That she saw the fire that burned the mill. (She then took a pencil and marked on the plat, Identification "B," where she claimed she first saw the fire. Marked an X at the place.)

That she was just opposite, but the fire seemed to be on the other side, but in a little while it was bigger. That she could see down underneath the roof. That there did not seem to be any fire there. That it

(Testimony of Anna D. McCarthey.)

seemed to be quite dark there. [21]

That, of course, was all afire soon after.

That the direction of the wind preceding the fire was all day from the north, but towards the evening it seemed from the west. The west wind would take wind from her place across the road. The mill was on the south side, while she was on the west side. The wind would then blow over the tracks toward the mill.

Witness was then asked by plaintiff's attorneys the following question:

Now, state to the jury whether or not you ever saw any other fires set by the Oregon-Washington and Northern Pacific Railway engines in this immediate vicinity, and within about thirty days prior to the happening of this fire.

To which question attorneys for the defendant Oregon-Washington Railroad & Navigation Company objected on the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore, limited, if the testimony was admissible at all, to fires started by this same engine; also upon the further ground that under the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Com-



(Testimony of Anna D. McCarthey.)

pany caused by a particular engine belonging to that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an [22] *independent of* negligence on the part of the defendant Northern Pacific Railway Company for which defendant Oregon-Washington Railroad and Navigation Co. was in no way responsible.

The Court overruled the objection. To which ruling the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company, and this was in the same manner overruled by the Court, to which ruling the defendant Northern Pacific Railway excepted and the exception was allowed.

The witness then answered: "Yes; every few days I would see fires, but they did not amount to much, because it was either put out by the engine-men themselves or section-men, or the neighbors used their hose and put them out along where I lived."

She was not sure just what time it was when she first saw this fire that burned the mill, but she knew all the midnight trains had passed. That there were none passed after they were fighting the fire.

On cross-examination the witness testified that *he* happened to see the fire first burning at the place

(Testimony of Anna D. McCarthey.)

where she had made an X, because she was asleep upstairs in the front room, and that faces the large building.

Sparks from the shingles blew over towards her place and made a noise on the house, and she thought that it was raining. It really seemed like the fire from the engines—anyway—her yard had been set afire many times, and she woke up hollering to her boy in the next room, asking him whether that was rain or what was coming down on the roof, and then he woke up and “I got up and raised the curtain and then saw that the building was [23] afire, and I said, ‘Get up, my boy, get up! We will all be burned up; the mill is afire!’ ”

That she was very much excited, and was afraid she would be burned and their house burned out. That she came downstairs, that her hose was on, and she commenced to hose off her house and around the fence, because it was cedar, and she was afraid it would burn, and she did not look at it very much afterwards.

That in a little while it was all in a big blaze and she could hear the firemen at the south end working down there; because there were seven or eight houses down there, and people excited and afraid their houses would be burned, because the wind was blowing that way.

That she did not see the fire department come. The fire department came on the other side, the south side. It came down Washington street.

That the fire being so close it caused her to move as

(Testimony of Anna D. McCarthey.)

fast as she could. That she had two houses and that to save that too. According to the wind taking the fire south, her house at the south side was in danger.

That there might have been more *first* when she first looked than she really saw in her haste. That she did not stop to examine particularly. That is, she did not just stand there and look. She got her hose and started to water the grass and surroundings.

That *first* had been set there before in the grass and everybody there was watching.

That the trainmen had put out fires when there were any. They would stay right on the crossing and puff and sent up sparks, and they would put it out, but they never got off the engines on purpose, but the section-men had several times. [24] It was all grass on the side of the road, and it was a very dry season.

That the cinders and stuff or shingles were falling on her roof during the fire. That there were lots of them.

When asked what brought them over there she said that she understood it was the water from the firemen; there was a great force, and using water from the other side.

The witness was asked if the firemen were not using water before she waked, and witness answered that she did not know, but what they were.

She thought the shingles were fanned up by the fire over there. That there were little pieces of shingle in the yard, and black cinders in the morning.

(Testimony of Anna D. McCarthey.)

Witness stated that she was awakened by shingles falling on the roof; and was then asked the following question by defendant's attorneys:

That must have been the water from the firemen putting out the fire, or the shingles and stuff from the building, and she answered: "Yes, it may have been. I don't know hardly."

Then she further stated that the wind had been blowing hard; it was not a regular storm, but it was blowing away from my place. There was a little breeze; the evening breeze and night breeze.

Then she was asked if she thought the shingles would blow against the breeze, and answered that she did not know, but that was the way it was. [25]

**[Testimony of John Horn, for Plaintiff (Recalled).]**

JOHN HORN was recalled as a witness for plaintiff and stated: That there was but very little wind on the evening of the fire. That it was blowing east over the railroad track towards the mill. Just a little. That there did not seem to be much when he first noticed it.

**[Testimony of J. D. Banker, for Plaintiff.]**

J. D. BANKER, a witness for plaintiff, testified that he had been down around plaintiff's mill. He was then asked the following question:

State whether or not at any time prior to the 15th of July, 1911, and within thirty days prior thereto, you ever saw any fires set along the tracks in this vicinity by sparks emitted from the engines of the Northern Pacific or Oregon-Washington Railroads.

(Testimony of J. D. Banker.)

The attorneys for defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general, and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore, limited, if the testimony was admissible at all, to fires started by this same engine; also upon the further ground that the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Company caused by a particular engine belonging to that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an independent act of negligence [26] on the part of the defendant Northern Pacific Railway Company for which defendant Oregon-Washington Railroad & Navigation Co. was in no way responsible. The Court overruled the objection. To which ruling the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company, and this was in the same manner overruled by the Court, to which ruling the defendant Northern

(Testimony of J. D. Banker.)

Pacific Railway excepted and the exception was allowed.

Then witness was immediately asked the following question: State the occurrence.

Attorneys for the defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon the same grounds as they made to the last preceding question above mentioned.

Objection was overruled and exception allowed.

The defendant Northern Pacific Railway Company made the same objection on its behalf and the objection was overruled and exception allowed.

Witness answered: I saw several grass fires started.

Then witness was immediately asked the following question: Did you ever see any sparks emitted from the engines of these companies about that time?

To this question defendant Oregon-Washington Railroad & Navigation Co. made the same objection as to the last two preceding questions and the defendant Northern Pacific Railway Company made the same objection; and an objection was also made upon the ground that the question was not limited to the thirty days referred to. When Mr. Hodge, attorney for [27] plaintiff, stated that he would limit all questions to that time.

The Court overruled the objection and each defendant separately excepted to the ruling of the Court and the exceptions were separately allowed.

Witness then answered as follows: Yes, sir, on one particular instance I was at the mill to see Mr. Horn,

(Testimony of J. D. Banker.)

and a train went by and scattered considerable fire while we were on the platform; quite a lot. That at this time he and Mr. Horn were on the far side of the mill from the track; on the east side of the mill. That sparks came over the mill and settled down all around them.

Witness also stated that he was a lumber dealer by occupation.

On cross-examination witness stated that he supposed it was fifteen or twenty days that this occurrence happened before the fire that burned the mill.

That the fire was started from the engine of a pretty heavy freight train. That the engine was working hard with it; that it had to get up lots of smoke. That it was somewhat upgrade going south. The engine would be required to work pretty hard if it had stopped at the station and then started up the grade with a heavy train.

That it had been his experience with an engine working pretty hard would throw out sparks, as a rule.

That he did not know what company's train it was, whether the Northern Pacific, or Great Northern or Oregon-Washington, or what. He could not say which. That sparks at that time did not start any fire.

That the season was quite dry. [28]

That it was his idea that everything was highly inflammable about there. That it was a time for everybody to be careful about it.

(Testimony of H. S. Savage.)

On redirect the witness testified that his reference to everybody being careful applied to railway companies as well as others. That it was a hazardous time.

**[Testimony of H. S. Savage, for Plaintiff.]**

H. S. SAVAGE, a witness for plaintiff, testified that his business was that of transfer, fuel and general contractor.

That he had been around plaintiff's mill in South Tacoma and had had a fuel-yard near there at the time the mill was destroyed.

Witness was asked the following question by plaintiff's attorneys:

State whether or not at any time, say within thirty days, prior to July 15, 1911, at or near the vicinity of this mill, you ever saw any fires set by sparks from the engines of the Northern Pacific or Oregon & Washington Railroads.

The attorneys for the defendant Oregon-Washington Railroad & Navigation Co. objected to this question upon the grounds that it was incompetent, irrelevant and immaterial; also on the ground that the question was too general and included both companies in the same question; also upon the ground that the admitted facts and stipulated facts showed that a particular engine which plaintiff claimed caused the injury, and that plaintiff was, therefore, limited if the testimony was admissible at all, to fires started by this same engine; also upon the further ground that the stipulation, Plaintiff's Exhibit "A," it appeared that plaintiff was undertaking to recover



(Testimony of H. S. Savage.)

on an independent action against the Oregon-Washington Railroad & Navigation Company caused by a particular engine belonging to [29] that company alone, and plaintiff was also undertaking to recover for the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company; that plaintiff was undertaking to show an independent act of negligence on the part of the defendant Northern Pacific Railway Company for which defendant Oregon-Washington Railroad & Navigation Co. was in no way responsible. The Court overruled the objection. To which ruling the defendant Oregon-Washington Railroad & Navigation Co. excepted and the exception was allowed.

An identical objection was made to this question by the defendant Northern Pacific Railway Company, and this was in the same manner overruled by the Court, to which ruling the defendant Northern Pacific Railway Company excepted and the exception was allowed.

Witness answered: Yes, sir. That he helped put some out.

On cross-examination witness was asked if he observed any fires set by the engines of the Great Northern Company and he answered as follows: I would not say what engines they were, but I saw several fires started from engines.

That he did not know whether it was the engines of the Northern Pacific, the Oregon-Washington or Great Northern. That he would not say which it was.

(Testimony of William Ebert.)

That it was a very dry time and everything was highly inflammable. [30]

**[Testimony of William Ebert, for Plaintiff.]**

WILLIAM EBERT, witness for plaintiff, stated that his business was street grading, and that he was engaged in that business in 1911 at South Tacoma.

That with reference to the Mentzer mill, he roomed and boarded right across the street from the dry kiln, east about 100 feet, he would judge.

That he saw the fire that burned the mill. That he could not tell what time it was, but that it was after midnight, and he would judge about half-past one, or something like that. That he was up at the time.

That he saw trains pass the mill that night going toward Portland, he thought. One was a freight and the other a passenger. That these trains were throwing up sparks. That the freight train went through first and was throwing up sparks. That there was quite a few sparks. That the size of the sparks, as near as he could tell, was about the size of a dime. That the sparks were going in the direction of the mill.

At this time he says he was on the east side of the mill; that is, on the same side of the track as the mill and further away. That ten or fifteen minutes after the freight train passed the passenger train passed. That this passenger train was throwing up

(Testimony of William Ebert.)

sparks. That the freight train was apparently pulling pretty hard.

That it was about fifteen or twenty minutes after these trains went by that he first saw the fire at the mill.

That the fire was located, when he saw it, at a place where he marked the letter "O" on Plaintiff's Exhibit "B," being in the roof.

That he could see underneath the mill. That the mill was all open. That there was no fire underneath the shed at [31] that time, and that there was no fire at the south end of the mill at that time, that he saw.

Then he was asked if anybody else was present at the time he saw the fire. He answered: He called up four or five men who were sleeping in the house with him and told them that the mill was afire.

He did not turn in any alarm.

On cross-examination he testified that the house he was living in was from ninety to one hundred feet east and south of the mill. That there was a street running between the mill and the house where he was living. That the house was just across the street from the end of the dry kiln, shown on exhibit "B." That he was sleeping upstairs. That he went to bed that evening about nine o'clock. That he waked up quite a number of times during the night.

That the way he happened to see the freight train was that he got up to go down to the closet and heard the train coming and looked out of the window to see what it was. That he saw it before he went down

(Testimony of William Ebert.)

to the closet. That at this time the train was coming along the track. It was down towards the depot. That it was probably three and a half to four blocks, somewhere along there from the mill. That he watched it two minutes, probably. That the train came up to the end of the mill while he was watching it. That he saw it throwing sparks all the way along and that it was throwing sparks when he first saw it. The sparks were about the size of a dime; and they were about the same size all the way along and that he saw them all the way. That he thought the size of a dime was about the size of the top of a finger or finger-nail. That these sparks looked to be about the size of a dime when [32] the engine was three blocks and a half or four blocks away, and that he could tell that they were as large as the end of a lead pencil; that they were larger than that.

Witness then testified that there did not look to be much difference between the size of a spark and the size of a lead pencil. That he did not pay much attention to whether the sparks were the size of a dime or not, but they looked to be. That he was sure they were bigger than a lead pencil. That he could not tell what number of sparks there were that were larger than a lead pencil, but that there were quite a few. That there were lots of sparks coming out of the engine and the engine was working hard. That he had no idea how many cars was in the train. That it might have been a quarter of a mile long or it might have been a half mile for all he knew. He did not see the tail end of it. That he was now par-

(Testimony of William Ebert.)

ticularly interested in the number of sparks it was throwing out or in the size of the sparks.

Then he testified that he went down to the toilet in the house—downstairs. That the passenger train did not go by until he came back upstairs. That he came back to the bedroom before he saw the passenger. When he first saw the passenger it was coming along by the feed-shed. This was about a black and a half, maybe two, from the mill. That that engine was throwing up a few sparks. That they did not appear to be as big as the sparks thrown by the freight. That there was not as many as from the freight. That none of these sparks were as large as a five cent piece. That some of them were as big as the end of a lead pencil. That he did not pay any particular attention to this. That after the passenger train went by he went back down to the toilet. Then he came back up [33] and after that he laid down. That he presumed he went to sleep. That he got into a drowse anyway. That he judged he was asleep or in a drowse about fifteen or twenty minutes. That the reason that he fixed this time was because he thought of going down to the toilet again. That he got up then and then is when he first saw the fire. That he then called the other boys. That they got up and came to the window and looked out.

That he could see the fire up in the roof. That he was on the opposite side of the mill from where he saw the fire.

That he had been at his rooming-house three months previous.

(Testimony of William Ebert.)

That he could see on top of the roof of the whole building.

That he did not turn in any fire-alarm, nor did the boys who were with him. Nor did they leave the room.

That he went back to bed after the fire engine arrived. That he could not say how long it was before the fire engine arrived. That he did not go down to turn in or send anybody to turn in an alarm. That he could not say why the other persons did not turn in the alarm. That the building burned pretty rapidly. [34]

That after he came up from the closet, and after seeing the train pass and laid down and snoozed awhile. After the passenger train passed. *He* waked up thinking it necessary to go to the toilet again, at which time he first saw the fire.

That he was a witness at the former trial of this case.

When asked if he did not testify in the former trial when he first came up from the closet, answered that he could not see it any other time. That if he was asked that question before he misunderstood it.

The witness was asked if he did not testify anything about lying down and taking a snooze before he *was* the fire, and he answered that he was never asked about it. That he was asked about it in another subsequent case.

The witness was asked the following question by one of defendant's attorneys:

"I will read from the former trial of the Mentzer

(Testimony of William Ebert.)

case and ask if the following did not occur: 'Q. When did you first learn that the mill was actually on fire.'

A. When I first learned it was when I came back up from the closet. Q. You saw it burning then?

A. Yes, sir, and I told the other boys that the mill was burning."

Q. That was 15 or 20 minutes after the passenger train passed? A. Yes, sir.

Didn't you so testify? The witness answered as follows: And I still testify to it now, the same.

Then he was again asked if he did not testify as read at the former trial and answered as follows:

"I testified I saw it after I came back from the closet, [35] and I do yet."

The witness was asked: Q. "You testify now that you lay down first?"

A. "That question was not asked me until the second trial."

Q. "But you were asked when you first saw the fire?"

A. "But you did not ask about the laying down. If you did I did not so understand."

"You did not look at your watch or any time-piece to see what time it was."

A. "I did not have a watch; it was broke, at the jewelers."

Q. "Do you know what time it was?"

A. "I do not."

The witness was asked the following question:

Q. "On the former trial of this case, didn't you testify: Q. Do you say you saw the mill on fire at

(Testimony of William Ebert.)

that time. A. Yes. Q. And you did not go over? A. No, sir. Q. You did not go to the fire? A. No, sir. Q. Did you turn in the fire alarm? A. I did not. Q. What was the reason you did not? A. In fact, I did not know where to go to turn it in. Q. What did you do, did you go to bed? A. I stayed by the window. Q. You went to bed; did you see anybody after the fire? A. I did,—at that time,—no, sir. Q. Afterwards, did you get up afterward? A. No, I did not lie down after that for about three-quarters of an hour, until after they got through working with the engines. I was sick myself that night and so consequently I did not get up to the fire." Was that your testimony on the former trial?

The witness answered as follows: I did not know where to turn in the alarm.

He was then asked the following question: But the question [36] is, did you testify on the former trial as I have read to you from this record? Have I read correctly your testimony?

The witness answered: I could not say as to what you read.

Then the following question was asked: Q. Would you say that you did not lie down after seeing this fire for about three-quarters of an hour?

A. I say so yet.

Q. And did you say so then?

A. The question after the fire, that is, after I saw the fire, I did not lie down three-quarters of an hour.

Q. And that you saw the fire as soon as you came



(Testimony of William Ebert.)

back from the closet? A. Yes, sir.

Q. Now, you testify that you lay down on the bed and took a snooze before you saw the fire?

A. What is that?

Q. You testify now that after you came up from the closet you lay down on the bed and took a snooze before you saw the fire?

A. I testified to that before the same.

Q. Did you testify to that on the former trial?

A. I think I did.

Q. Well, I can't find it in the record.

A. You can't.

On redirect witness stated that after the passenger train went by that he lay down and took a sleep. That he thought he slept about fifteen or twenty minutes and then waked up again to go to the closet, and he saw the mill was on [37] fire. That it was not daylight at that time.

**[Testimony of G. Begardis, for Plaintiff.]**

G. BEGARDIS, a witness for the plaintiff, testified as follows: That he was in South Tacoma on the 15th of July, 1911, across the street from where the mill burned, in the same house with the witness Ebert. That he saw the mill burn.

The fire when he first saw it was on the roof. Practically in the middle, but mostly at the end. Being the same end that Ebert testified about.

That he could see underneath the roof most of the way, and that he did not notice any fire under the roof. It was not daylight.

The wind was practically in the west.

(Testimony of G. Begardis.)

On cross-examination he testified that he did not see any trains go by. That either the witness Ebert waked him up, or he waked up anyway.

That Ebert spoke about the mill being burned. And he presumed he waked him. That he got up and went to the window.

That he did not notice anybody around the building at first, but afterwards. Did not go to turn in any fire-alarm. That he did not know where the fire-alarm was. Did not know how to turn it in, if he went there.

Made no inquiry as to how to put out the fire or to get the alarm to the station. Did not think there was any telephone in the house. Did not go to the neighbors to see if they had one. Did not go out of the house or leave the room. Did not go over to see if he could do anything at the fire to protect property. That the mill could burn for all of him,—he was in no shape to go over there, anyway.

That when he first saw the fire it had got a start.

[38]

That there was quite a spot there already burned; and burned pretty fast. It was not long after the fire before persons began to get there. They came pretty rapidly.

That he did not see anybody he knew. That he thought they were firemen. And these were the people he had reference to that he saw there.

That it was burning over the peak of the roof, when he first saw the fire. On the opposite side, he could not see. He did not know how much had burned

(Testimony of G. Begardis.)

there. That he was shut off from that part of the building and that it burned quite rapidly.

**[Testimony of J. W. Quick, for Plaintiff.]**

J. W. QUICK, witness for plaintiff, testified that he was assistant counsel for the Northern Pacific Railway Co., that as counsel for the Northern Pacific Railway Co. he would have in his possession any reports and papers of any description made by the engineers, firemen, and conductors of the Northern Pacific Railway Co. from train known as 680, coming into South Tacoma on the morning of the 15th of July, 1911, in matters relating to that train with reference to this case.

That the engineer and the man having charge of the train did not make a regular report of the trip above referred to.

That the only reports made were special reports called for by the witness afterwards.

That the engineer did not make a report in the ordinary course of business in which he spoke of seeing the fire there as he came through South Tacoma.

In further response to questions witness testified that the engineer never made any report; that witness had heard of. That he knew of no reasons why he should. That the regular [39] form of report did not call for anything of that kind. He never saw any such report in this case and he did not think there was any made. If there was, he would have had it, and he did not have it.

**[Testimony of W. C. Gillman, for Plaintiff.]**

W. C. GILLMAN testified, on behalf of plaintiff, that he was a locomotive engineer working for the defendant Northern Pacific Railway Co., at the time and on the 15th day of July, 1911.

That he was the engineer on 680, coming from Portland to South Tacoma, on the morning of the 15th of July, 1911.

That there were two engineers, and he was one of them. There were two engines on the train.

That he did not make any report in the morning of this fire to the Northern Pacific Railway Co.

Thereupon the plaintiffs' attorney introduced in evidence identification "B," and it was admitted in evidence as Plaintiff's Exhibit "B," being the diagram of the building, used by witnesses in their examination.

Whereupon Mr. Bedford, attorney for plaintiff, announced that plaintiff was through with their testimony, except one witness, and they could not procure him until the following day.

It was thereupon agreed that the defendants should proceed with their testimony, reserving the right to put in a motion for a nonsuit or make other motions upon plaintiff's finally closing his case.

[40]

**[Testimony of C. D. Savery, for Defendants.]**

C. D. SAVERY was then called as a witness for the defendants.

He testified that he acted as stenographer in reporting the former trial of this same case. That he

(Testimony of C. D. Savery.)

could tell from the notes of the testimony that he made at the time of the trial what the testimony of Mr. Ebert was at that time.

That Ebert testified as follows; in answer to questions propounded to him:

Q. I will ask you if the following question and answer was propounded to Mr. Ebert and afterwards by him: Q. When did you first learn that the mill was actually on fire? A. When I first learned it, it was when I came back up from the closet.

A. Yes, sir.

Q. Was the following question and answer asked of him and answered by him: Q. You saw it burning then? A. Yes, sir; and I told the other boys the mill was burning.

A. Yes, sir.

Q. And the following question and answer: Q. That was 15 or 20 minutes after the passenger train passed? A. Yes, sir. A. Yes, sir.

Q. And the following question and answer: "You say you saw the mill on fire at that time? Yes? A. Yes, sir."

Q. And the following question and answer: "Q. Did you get up afterwards: No, I did not lie down after that for about three-quarters of an hour until after they quit working with the engine. I was sick myself that night and so consequently I did not get up to the fire." Was that question and answer given? A. Yes, sir.

Q. And the following question and answer: "Q. Now, how long was it before you did lie down after

(Testimony of C. D. Savery.)

you saw the fire? A. After the fire engine came I would judge about three-quarters [41] of an hour?" A. Yes, sir.

Q. And the following: Q. You were up for three-quarters of an hour? A. Somewhere about that.

A. Yes, sir.

On cross-examination by Mr. Hodge, one of plaintiff's attorneys, the witness testified further in regard to Ebert's testimony at the former trial as follows:

Q. Will you state that the answer to the question, "Did you get up afterward? A. No, I did not lie down after that for about three-quarters of an hour, until after they got to working with the engine." Was that not following and in response to prior questions which read as follows: After stating that he saw the mill afire— Q. Did you go to the fire? A. No, sir. Q. Did you turn in any fire alarm? I did not. Q. What did you do: go to bed? A. I stayed by the window. Q. You went to bed. Did you see anybody after the fire? A. I did. Q. At that time? A. No, sir, afterward."

A. Yes, sir, that is the way his testimony came.

Q. And the next question: Q. Now, how long was it before you lay down after you saw the fire? A. After the fire engine came I would judge about three-quarters of an hour. A. Somewhere about that? A. Yes, sir.

[**Testimony of M. F. Brown, for Defendant Northern Pacific Railway Company.**]

M. F. BROWN was then called as a witness on behalf of defendant Northern Pacific Railway Co. and examined by Mr. Quick, its attorney.

He testified that he was a locomotive engineer in the employ of that company. That he had been such engineer for over eleven years. That he had been employed by the Northern [42] Pacific since 1897. That he was at present examining locomotive-men and trainmen for promotion on the Northern Pacific.

That he was the engineer in charge of engine pulling train 301 on the night of July 15, 1911. That it was a night train composed of sleepers, heavy coaches and express and baggage, and mail car. That the size of the train was eight cars. That was the usual or normal train. That the train was going towards Portland from Tacoma and the number of the engine was 2107.

That the engine was a Pacific Type passenger, one of the largest engines the Northern Pacific had in the passenger service. That it was of sufficient size and power for the proper hauling of the train it was pulling at the time. That it was constructed, as most all of the engines are, with a netting in the front end between the smokestack and flues, to prevent sparks from coming out directly from the fire to the atmosphere. That the netting was down in the front part of the engine, in what is called the smokebox, or front end of the engine. That this netting consisted of about a four mesh, some three and some four. That the hole in the mesh would be

(Testimony of M. F. Brown.)

about the same size. The four mesh would have four openings to the inch and the three mesh would have three openings to the inch. That the wire was larger on the number three than on the number four mesh.

That the engine at that time was in first-class condition. It was practically new and just out of the shops a short time.

That he could not state in particular just how he was handling the engine when passing through South Tacoma that [43] night, but the usual manner in pulling a train or the manner of handling it each night is about the same. That the train does not stop at South Tacoma, but slowed up to pick up the mail, and we generally get orders there.

That these orders were picked up on a hoop or from a hoop handed up by the operator. Then the orders would be read, and the train would drift along slowly until the orders were read and the engineer knew what arrangements were to be made to meet trains along the road, and then start on.

That in starting he would naturally open the throttle a little and put the reverse lever from the center, and start the train easy, without jerking the passengers or the train. That he would have to apply additional steam to get up speed.

That there is a slight upgrade after leaving the station and for a short distance in going south. That it was necessary when getting up speed in going upgrade to work steam; and when this was done sparks sometimes came from the smokestack; not only at



(Testimony of M. F. Brown.)

the place referred to but at any time he worked steam.

That in his experience as an engineer he was familiar with the character of the coal used here on the west side of the mountains, also with the character of the netting used in the spark-arresters of the engine. That the spark-arrester in this engine was the same character of netting as was used here on the engines of this type. That he did not know of any spark-arrester that was used on engines of this type that would arrest all of the sparks when you are working steam.

That the name of the fireman on this train was Henry Ehlers. That he was an old, experienced fireman who had been [44] firing for several years.

That he did not observe any sparks coming from the engine on the trip referred to in unusual quantities or unusual size.

That the engine was drafted in such a manner that she did not throw sparks as much as she did later on.

That they had tried to sacrifice her steaming qualities a little for speeding, by giving her less draft, but decided afterward that the engine required more draft.

At this particular time the engine was very easy on the fire.

On cross-examination the witness testified that he examined this engine before he started out on the trip referred to. That he did not examine the spark-arrester.

He testified that the spark-arrester would be ex-

(Testimony of M. F. Brown.)

amined by the roundhouse force, and at any time it was not in good condition he would know it by the action of the engine.

That some sparks were bound to come out of the engine.

That he testified in the Allen case against the Northern Pacific and Oregon Short Line railroads about three months wherein suit was brought against these companies for setting this fire.

That he did not testify at that time that he had not seen a spark in three months come from this engine.

The following question and answers were asked on cross-examination and made by the witness:

Q. I am reading from your testimony on cross-examination: "Q. How far will sparks go from this engine while the spark-arrester is in good condition?

A. Well, to the best of my recollection for three months I remember only seeing one spark. Q. And

that was a little one, I suppose? A. Well it [45] was not the size of a dime. Q. What called your

particular attention to that spark? A. For the simple reason that that was the only one I had seen for so long." Is that your testimony?

A. I think very likely that it is.

Q. Then which of your testimony is correct—this or that? A. They are both, I think.

Q. You testify now that you saw sparks, and at that time you testified that you did not see sparks?

A. Well, a great many times when sparks come out, a spark may come out in the daytime but you don't see it, but you know they are coming out from

(Testimony of M. F. Brown.)

the cinders that are flying. That is the general idea or expression amongst the railroad men, that when cinders come out, they are sparks.

Q. Then you did not see sparks come out this evening?

A. No, I don't know as I did. I don't believe that I said that I did.

Q. Then your former testimony is true that you had only seen one spark in three months from this engine? A. Well, a very large spark.

Q. Where was that one?

A. That was some time after we left South Tacoma.

Q. About this same neighborhood?

A. We cannot always remember within a short distance, but it was within that vicinity.

Q. State to the jury about the size of that spark.

A. I would not venture to say. [46]

**[Testimony of Henry Ehlors, for Defendant Northern Pacific Railway Company.**

HENRY EHLORS testified as a witness for the defendant Northern Pacific Railway Co.

He testified that he was in the employ of the defendant Northern Pacific Railway Co. in the capacity of fireman. That he was the fireman on engine 2107, pulling train 301 on the night of July 15, 1911.

That the witness Brown, who preceded him, was the engineer.

That witness had been a fireman since 1906 in the service almost constantly, with the exception of eleven months.

That the spark-arrester, ash-pan and deflector of

(Testimony of Henry Ehlers.)

the engine were in good condition and were handled in the usual way.

On cross-examination he testified that he did not examine the spark-arrester before starting on the run. That he would know whether it was in good condition or not because he would notice the different action of it. That if there was anything wrong with it a man that was on it every day would notice it. That it would have different action. That if there was something wrong with the spark-arrester it would either clog up and the engine would not steam, and if there were holes in it it would throw fire. If it threw fire the engine wouldn't steam.

Then witness was asked on cross-examination what different action would there be if there was a hole in there the size of a quarter of a dollar, and witness answered it would be able to throw a chunk of fire the same size as the hole.

The witness was then asked this question:  
Q. What difference in the action of the engine?

Witness answered, "It would tear holes in my fire." That he could tell by his fire in the fire-box. It would tear holes right through it.

Then he was asked on cross-examination as follows:  
[47]

Would they be noticeable if the holes were only half an inch in size or an inch?

The witness answered it would be different according to the size. The bigger the hole in the netting the stronger the action on the fire in a certain place.

That the netting would be in the front end of the

(Testimony of Henry Ehlers.)

engine away from the fire; that it was in the place where the draft goes through, and to some extent interferes with the draft. That the draft goes through where there is the least resistance.

That he had been on this particular run mostly for the last three years.

That he did not see the spark that Mr. Brown testified about and that he wasn't with him at that time. That he had seen sparks and had felt them also coming over the engine. That he would not say for sure that he seen these when Mr. Brown was on the engine. That Mr. Brown was generally on the engine with him.

The witness testified that he had seen sparks coming from the engine when Brown was on the engine with him and the engine did throw sparks when Brown was on it.

That the netting was never out of repair while he was on the engine, that he remembered of, and that he never did run the engine when the spark-arrester was out of repair, that he remembered of. That it was always in good condition. That he supposed the spark-arresters would get out of repair. That they were bound to. That he fired on this particular engine some months prior to the fire. [48]

**[Testimony of M. J. McMahan, for Defendant  
Northern Pacific Railway Company.]**

M. J. McMAHON, a witness for the defendant Northern Pacific Railway Company, testified that he was a roundhouse foreman, located in Tacoma, in the employ of the Northern Pacific. Had been such

(Testimony of M. J. McMahon.)

foreman about 5 years at this time and had been connected with the mechanical departments of railroads for about thirty years. That there was a general inspection of engines as to their spark-arresters, ash-pans and deflectors once every six days. That a record of this inspection is kept. That he had a record of the inspection of engine 2107. That this engine was inspected on July 13, 1911. That a man by the name of Purdy made the inspection.

When last heard of Purdy was in Virginia. That he was familiar with the signature of Mr. Purdy and his handwriting and the written inspection which witness had in his hand was the writing of Purdy.

That at the top of the head of one column was the word "netting." That this referred to the netting in the front. That it had been examined. That this netting is what is called the spark-arrester. That the next column is headed "deflector plates." That this is the plat that is dropped or lowered to give the engine proper draft.

That the next column is headed "ash-pan." That this was under the grates and had to be examined.

The next column is headed "dampers." That it was connected with the ash-pan front and back.

That the record was made by the man who does the inspecting every night at 5:30, within 30 minutes, and makes the record at the close of each day's work.

In answers to questions here propounded by Mr. Hodge, one of plaintiff's attorneys, witness testified that the record was [49] made from the inspection of the engine. That he kept a book, other than

(Testimony of M. J. McMahon.)

the one witness had, not quite so large, which the inspectors carried in order to keep this one clean. That he saw that book on the evening of July 13, 1911. That he saw it most every day.

Witness then testified on direct that this record showed the inspection of the engine referred to on the 13th day of July, 1911, and the inspection showed that the netting was in bad order and the netting was repaired on that day.

The inspection also showed that the deflector plates were found in good condition and the ash-pan and dampers in good condition.

That the next inspection of engine 2107 was on the 20th day of July, 1911. That the inspection on the 20th showed that it was in good condition, as were the deflector plates and the ash-pan and the dampers.

That the netting was made of wire crossed.

Witness was then shown Identification No. 1 of defendant Northern Pacific Railway Company, a piece of wire netting, and stated that it was the company's standard front and netting. That it was the character of netting that was in this engine at the time, and in all the engines of the Northern Pacific Co. of that type at that time. That it was the type of netting generally used and was standard netting.

On cross-examination witness testified that the last inspection before the 13th of July, 1911, was on the 6th day of July, 1911. That the netting must have been out of order when it was pulling into Tacoma on the 13th of July 1911.

(Testimony of M. J. McMahon.)

He again testified that the next inspection after the 13th [50] was on July 20, 1911, and everything was found in first-class condition.

He also testified that he did not make these inspections himself. That two men were employed for that purpose and they had to rely upon their word for it, and the man was not here who made the inspection.

Then witness was asked the following question: So that if he reported O. K. and it was not O. K., how do you know it?

The witness answered as follows: I would not say right there, but it is my business to see that he does it perfectly.

Q. But if you did not examine the netting, how do you know?

A. I would not know, only I know what the man is; he would not let anything go; he knows his instructions and that is his only work. That he had to rely upon the inspector and the record made by him.

**[Testimony of J. A. Donovan, for Defendant Oregon-Washington Railroad & Navigation Company.]**

J. A. DONOVAN, a witness for the defendant, Oregon-Washington Railroad & Navigation Co., testified that his occupation was that of boiler-maker and that he was working for the defendant Oregon-Washington Railroad & Navigation Co. during July, 1911. That his duties in connection with the inspection and handling of engines was in the capacity of inspector of the spark arresting apparatus.



(Testimony J. A. Donovan.)

Such as netting in the front ends and stacks and ash-pans.

That if he found anything wrong it was his duty to make a record of it in the blank form and stock-book that was kept for this purpose.

That the apparatus would be repaired if anything was wrong and that would be put on record. What was the matter and the nature of the repairs. [51]

That he made inspections in Albino, Oregon. That other inspections would be made at different places on the line. He presumed at Seattle and Chehalis.

That he made a record of the condition of each engine that he inspected.

Witness was then shown a book and a page therein marked X, containing entries which purported to relate to engine 527, and was asked if the first five entries on these two pages were in his handwriting. He answered that they were not in his handwriting. That the first three entries and the fifth entry was in his handwriting, and the fourth and sixth were not in his handwriting. That he knew in whose handwriting these entries, four and six, were. That they were in the handwriting of one Fred Zintz, who was another inspector—the night inspector. That the book shown him was one he kept at the time he made the inspections.

Then he was asked to state the condition of the engine at different times in July, 1911—engine, fire apparatus, netting, etc.

Witness testified that the record of inspection of 527 in July, 1911, at Albino, on July 4th, the condi-

(Testimony J. A. Donovan.)

tion of smokestack and netting, front end, was good, and the condition of the ash-pan and netting was good. The inspection was made by me.

He also testified on July 7th and 8th he made inspections of the condition of the smokestack, netting, ash-pan, etc., was good.

He stated from these inspections made on the dates he referred to there was nothing wrong with the engine or apparatus in connection with the smokestack or arresters or spark-arresters. [52]

He further testified that these inspections were made as follows: When the engines arrived in the house the front end would be opened up, the trap-door in front taken off in front of the netting, take a light and go inside, examine the netting thoroughly from the top, and then go down at the bottom and examine it from the bottom, to give it a thorough inspection, look it all over, that is the front end part. As to the ash-pan, the inspector would go down to the ash-pan and examine that thoroughly, taking the light, if there is any dark place, and look all around and see that there is nothing the matter, no holes in it that fire could escape.

That if the inspector found anything wrong with the engine, he would report it and repair it and the repairs would be reported.

That engine No. 527 was a comparatively new engine, had not been in service very long. That this engine, 527, compared with and was equal to any engine he had ever seen. That included the spark-arresting apparatus, ash-pans and everything.

(Testimony J. A. Donovan.)

That he had been an inspector in this class of work for about thirteen years. That he was not in the employ of the defendant, Oregon-Washington Railroad & Navigation Co. at the present time. Nor had he been for over a year and a half, having severed his connection on September 30, 1911, because of a strike of the shopmen.

On cross-examination witness testified that he had inspected a great many engines in performing his duties. That in the month of July he inspected No. 524, and that a reference in the book to 525 was in his handwriting; also 528 and 529 [53] and 526, which inspections were made in the month of July, 1911. That he did inspect all engines numbers 504 to 527 during the month of July, 1911, as shown in the book he had referred to. That is, he inspected all that was put in that book.

That the reason he recalled that 527 was such a good engine was because 527 was an engine of the Mikado type. It was a noble-looking machine and it was modern. It was a modern freight engine and was well equipped. As he recalled it was equal to any freight engine at that time.

That it was not a fact that all of the 500 type of engines are Mikado engines that run out of Albino at that time.

That all the entries in the book relating to the condition of engines made by him were correct. All those which had his signature.

**[Testimony of George McAlevy, for Defendants.]**

GEORGE McALEVY, a witness called for both defendants, testified that he was Chief of the Tacoma Fire Department and had been for eight years, and had been a fireman for sixteen years. That the central office of the fire department in Tacoma, Washington, was at 9th and A streets.

That the city had what was known as the Game-well Electric Box-alarm system and also telephones. That when a fire-alarm was turned in at one of the boxes it gave to the department the location of the box and the corner of the street.

That he remembered the fire that burned the mill referred to in the testimony on the night of July 15, 1911. That the fire-box was at 58th and Washington Streets, which was across the street from where the building was situated that [54] burned. That it was north of the plant adjoining the property—the property at the street corner. That the alarm turned in there would report at the central office in the city. That there was a man on watch at the central office at all times and that a record was kept at the central office of the time when all alarms were turned in. That an alarm turned in at the box at 58th and Washington Streets would take about twelve seconds at the central station to get the number of the box, but that the alarm would reach the central office immediately.

That the man on watch at the central office would make a record of the time when the alarm was turned in. That he had a record of the time that the alarm

(Testimony of George McAlevy.)

was turned in from 58th and Washington Streets on the night of July 15, 1911. That this record showed the time the fire was turned in at the central office. This showed 3:50 A. M. at 58th and Washington Streets, July 15, 1911.

That the witness went to the fire after he got telephone information about what it was, and learning that it was the mill building he drove out and was there twenty-five or thirty minutes after the alarm was received.

That he was familiar with the character of the mill that burned, in a general way. That the conditions at that time of the year, that season, was very dry.

That from his experience as a fireman and the handling of fires and the observing of them starting and as to how long it would take for a fire to start on the roof of a building like the mill building if a spark alighted on it when extremely dry stated, in his opinion, it would start right away.

He stated that there was no other alarm turned in from [55] the box at 58th and Washington streets that night that he knew of.

On cross-examination witness testified that he thought the roof of the building was covered with some kind of paper. That he was not sure—that it might be shingles, but he thought it was a black paper of some kind. That he was not guessing at it that he was there and saw the paper during the fire.

That when he arrived there some portions of the mill—the southwest corner was still intact. That is, a small portion of it. That he thought the whole

(Testimony of George McAlevy.)

building was burned although he thought that a part of the roof was saved—a diagonal piece 5x20 or something like that.

That was a part of the roof he saw and was a part that was on the main building.

That it might be possible that the part he was referring to burned after he got there. He would not be exactly sure about it. But it struck him and he remembered it being a kind of black tar paper. That it was not a sort of asbestos paper.

That most of the shingled roofs were covered with a kind of skift or dust and he figured that was the condition there. That it was pretty apt to be that way. He never saw one that was free from dust.

That the time within which a spark would blaze up on a roof of that kind would depend on the starting, on the amount of wind, more or less, but if the spark did not take effect right away, or within fifteen minutes, he thought it would go out. That a spark would not lay in sawdust when there was no breeze for more than [56] fifteen minutes before it either set fire to the sawdust in that time or it would go out. It might be that a spark would lie in sawdust and smoulder for as long as an hour or two before it would blaze up if a draft of wind did not reach it.

That he did not think if this roof had sawdust on it and there was no draft of wind that a spark could have laid on this roof an hour before it blazed up. That the blaze would certainly show itself in much less time than that. In his opinion it would show it-

(Testimony of George McAlevy.)

self in from 12 to 15 minutes and be burning in good shape.

On cross-examination: Q. Referring to Identification "B," the tall building being at the north and the shorter building reaching south, the wind being in a northeasterly direction and not strong in the corner where the two buildings join, if sawdust should accumulate at this point and that sparks should drop in the sawdust where no wind would reach it at all, do you mean to state that that spark would blaze up within ten or fifteen minutes? A. I think that would be reasonable.

Then witness testified that it was not possible that a spark might lay for an hour or more as it would lay in any other sawdust, that the conditions there were somewhat changed. That the dust was not green and that it had to come up there in a sort of powder. That he did not think this would affect it any. That the paper roof would not burn as quick as shingles. That he would say the shingle roof would be more inflammable. That a spark on a shingle roof would blaze up almost instantaneously when they were dry. They were like powder, almost. [57]

**[Testimony of Charles Ryan, for Defendants.]**

CHARLES RYAN, a witness on behalf of both defendants, testified: That he was a city fireman and was in that business in July, 1911, and was stationed in No. 7 engine-house, South Tacoma.

That he knew where the fire was when the mill burned at 58th and Washington streets. That he

(Testimony of Charles Ryan.)

was at the fire station at South Tacoma when the alarm came in. That the alarm was received at a little before 4 o'clock. That when the alarm was received at that place the fireman hitched up and got to the fire as quick as they could. That it was about six blocks from the fire station to the mill that burned. That the motive power of getting there was horses. That they went there on a run immediately after the alarm came in. That the condition of the building at the time he reached there was that the building was on fire entirely. That it took about three minutes to get from the fire station to the mill building and this included the time of getting the water turned on. That it was about three minutes from the time the alarm was received until they had water playing on the building. That at that time the fire was all over, breaking out through the room; it was a mass of fire; the roof fell shortly after they got there. That there was fire entirely inside the building. That it was daylight and it was light when the alarm was received.

On cross-examination witness testified that the mill was totally destroyed. That from the time that he arrived there until it was totally destroyed was about twenty minutes, not over that. That the roof was all afire when the firemen got there and in twenty minutes the building was destroyed. That he did not remember that any part of the roof was left. [58] That he did not think that within thirty minutes after the fire-alarm was turned in there was



(Testimony of C. B. Lindsay.)

any part of the roof left. That he could not state definitely the character of the roof.

**[Testimony of C. B. Lindsay, for Defendants.]**

C. B. LINDSAY, a witness on behalf of both defendants, testified that he was a city patrolman and was such on the 15th of July, 1911, and located at South Tacoma.

The other patrolman there was a Mr. Guy. That he and Guy were patrolling South Tacoma on July 15, 1911.

That he remembered the fire when the mill burned at 58th and Washington.

That he was at South Tacoma when passenger train 301 went through at the South Tacoma depot. That he and Guy walked over to meet the train. That is to be there when the train pulled in,

That he was at the depot when the O. & W. freight went through just before the passenger. That they stayed there until two o'clock. That they were outside the depot when the trains went through and witness went into the depot immediately after the freight train pulled through.

That he did not observe any sparks coming from the engines of either of these trains.

That after passenger train 301 went south Mr. Guy made his report to the central station at two o'clock and then went south on the track as far as 58th street, which is the street where this mill was located. From there they went to Union Avenue and back north against to the business part of South Tacoma—52d and 54th streets.

(Testimony of C. B. Lindsay.)

That in going down to the depot from 58th he would not say that he and Guy ran a footrace. That they looked around South Tacoma and the Addison-Hill mill. There was a burner [59] there. That they always looked around there to pick up any hoboos and to examine empty cars. That policemen did not travel very fast anyway, especially at night.

That when they got to the mill property they did not notice any sign of fire around there. That there was no sign of it.

That they did not leave the depot until after two o'clock. That he would not say for sure at what time he next got back. That he would first make a report at 2:30. He was not very strict about the time. That sometimes it was half an hour between the time Guy reported and the time witness reported.

That after being down by the mill property they went east on 58th street to Union Avenue to the business part of town—54th and 52d streets. That then from this point he did not just remember where they went. That usually they put in their time around the main part of town.

That he remembered when the alarm was turned in, but at this time he had reported at the police station at South Tacoma, at 52d and Puget Sound, in the same building where the fire company was, where they had their headquarters and he had gone home. That he lived eight blocks from the police station. That when he went home he went into the toilet and from the toilet window he could look in the direction of the mill. When he went into the toilet he saw

(Testimony of C. B. Lindsay.)

smoke from down there—a big volume—and his first impression was that it was a garage between him and the mill. That he put on his coat and started down right away. That when he got half-way he saw the fire apparatus going up Union Avenue. This was after his 3:30 A. M. report. That he reported at the station at 3:30. That he went to the fire. That it was [60] getting at this time pretty good daylight. That the fire department got to the fire before he did.

That during the winter months the policeman found a good many hoboos on their patrol; in the summer months not so many, but there were some.

On cross-examination witness testified that he did not see any hoboos that night at all. That he never saw any hoboos in the Mentzer mill. Once in awhile they would find them in empty cars. That the mill was not an ideal place for hoboos; it was too open.

That he would say that when the freight train went out of South Tacoma it was working hard. That he did not look to see sparks. That he went right into the depot when the train went by. That it might have been shooting up sparks and he not have noticed it.

Then witness testified in answer to a question propounded by defendant's attorneys, that there was nothing to keep hoboos from roosting in the mill if they wanted to, in the condition of the weather; that it was all open. That the mill was not an ideal place to sleep. He also testified on redirect that the freight train was laboring more than freight trains

(Testimony of C. B. Lindsay. )

usually labor going up the grade from South Tacoma.

On recross-examination witness testified that he did not go down to the mill at all. That he went across the street from the mill. That a spark might have been smouldering along the south side of the building and he not notice it.

Witness also testified that he was close to the mill. That he and Guy passed right along the street, perhaps fifty feet from the mill, on the north side of the street. [61]

**[Testimony of M. D. Guy, for Defendants.]**

M. D. GUY, sworn as a witness on behalf of both defendants, testified that his business was that of police officer and was in July, 1911, and that he was located in South Tacoma.

That he remembered the burning of the mill at 58th and Washington streets. That he was at the South Tacoma station when passenger train 301, Northern Pacific, southbound went through.

That he was with Officer Lindsay.

That he was also there when the O. & W. freight went through. That he noticed both these trains as they went through. That he was on the outside of the station. That he did not observe the engine of either of these trains throwing sparks. That after the passenger train went through he and Lindsay went in and reported and then went south up the railroad track as far as 58th street.

That in going they looked around the South Tacoma burners when they generally found a few

(Testimony of M. D. Guy.)

hoboes at 54th and Washington and around through the box-cars and on down to 58th street. That when they got to 58th street they turned each to Union Avenue and back to the main part of town.

That he did not observe any sign of fire at the mill. That when the fire-alarm was turned in he was at the station in South Tacoma—the police station. That it took, in his opinion, about twenty to thirty minutes to go from the depot down to the mill at 58th street.

That when the alarm was turned in he was making his four o'clock report. That when the alarm was turned in he went to the fire. That he went after the fire department.

That the police station and fire station were in the [62] same building.

That when he arrived at the fire the whole building was afire.

On cross-examination witness testified that it would be pretty hard to tell where most of the fire was when he arrived—whether at the north end or at the south end. That he did not believe the dry kiln burned, and that most of the fire must have been at the north end of the mill.

That he did not see any hoboes around the mill, but there was plenty of room for them.

That the train might have been shooting up sparks after it left the depot and he not have noticed it.

That he believed he made some remark about the engineer patting his engine on its back to Mr. Lindsay when the train started from South Tacoma.

That the best of his recollection was that the train

(Testimony of M. D. Guy.)

seemed to be just ahead of 301 when he was furthest away, and when he went up to Mr. Lindsay he made some remark to that effect. That she was trying to get out of the road of 301 or something like that. He would not be positive.

On redirect the witness testified that it was nothing unusual for a freight train to labor more or less in going upgrade at that place.

That he did not see any display of sparks and large firebrands floating through the air toward this mill or in any direction.

That the part of the mill where the stack was, was covered with black paper, to the best of his recollection, but the end crosswise next to 58th street, he thought was shingles. That he did not go down to the mill but was just [63] across the street. There might have been a spark smoldering on the south side of the tall building and he not have seen it.

**[Testimony of C. P. Sharman, for Defendants.]**

C. P. SHARMAN, a witness on behalf of both defendants, testified that in July, 1911, he was living at 58th and Union Avenue, South Tacoma; business laundryman. That he was not connected in any way with the defendant companies.

That he remembered the fire that destroyed the mill at 58th and Washington Streets. That this house was about 200 or 175 feet from the mill.

That when he observed the fire he aroused his wife and babies and put on his pants and turned in the alarm. That he had to go about 175 to 200 feet to turn in the alarm. That the alarm-box was

(Testimony of C. P. Sharman.)

located catacorner across the street from the mill. That the fire department responded promptly to the alarm. That it was practically daylight at this time. Kind of dawn. That he never made any note of the time and did not know what time it was.

On cross-examination the witness testified that it was pretty early daylight.

That when he first saw the fire it was burning between the boiler-room and the north end—the center part of the mill. That he could see down below. That it was all afire down below and on the roof—on top of the roof—below and above. [64]

**[Testimony of G. O. Portrude, for Defendant  
Northern Pacific Railway Company.]**

G. O. PORTRUDE, a witness on behalf of defendant Northern Pacific Railway Co., testified that he was in the employ of the defendant Northern Pacific Railway Co. as a locomotive engineer and was operating train on the night of July 15, 1911, train No. 680, going from Portland to Tacoma. Two engines on this train. He had the leading engine and controlled the train.

That he knew where the mill was located at 58th and Washington streets. That when he came by the mill on this trip he was not working steam because he was making a stop for the double track switch and had to stop and test the air at South Tacoma. That in coming towards Tacoma from Portland it was downgrade slightly. That neither engine was working steam.

That in passing he would be on the right side of

(Testimony of G. O. Portrude.)

the engine as to the mill. That he did not observe any fire at the mill when he passed.

On cross-examination witness testified that he did not make a report of the fire to the Northern Pacific Railway Company and he never made a report of the same, nor did he make any report to Mr. Quick or the company as to whether there was a fire there or not.

That Engineer Gillman was on the same train.

On examination by Mr. Sullivan, attorney for defendant Oregon-Washington Railroad & Navigation Co., witness testified that he left Lake View at 3:25 and got to South Tacoma about 3:35 A. M. That there was fifty or fifty-five cars in the train he was testifying about, loaded with freight. There might have been a few empties. [65]

**[Testimony of J. J. Driscoll, for Defendant Oregon-Washington Railroad & Navigation Company.]**

J. J. DRISCOLL, a witness called on behalf of defendant Oregon-Washington Railroad & Navigation Co., testified that he was a boiler-maker by occupation and had been for over twenty years. That during the year 1911 he was employed by the defendant Oregon-Washington Railroad & Navigation Co.

That his duties as a boiler-maker were general work, inspection of engines arriving and leaving and care of all boilers. That this included the inspection of engines in regard to the netting, fire apparatus and spark-arresters, etc. That he was located at Seattle and inspected the engines of the company during the month of July, 1911. Had inspected



(Testimony of J. J. Driscoll.)

engine 527 during that time. That he kept a record of inspections and made them in his own handwriting.

Witness on being handed a book of records of inspections looked at the page marked X under engine 527, in July, 1911, and stated that the handwriting as to the entry made on that page and the following page was his and he made the entry. That he made the inspection at the time indicated.

That on the 16th day of July, 1911, the condition of the engine, fire apparatus, netting, etc., was good, no repairs were made whatever. That the netting was good, ash-pan good, stack good, good all around, repairs made, none.

That if there had been any defects in the apparatus it would have been reported as defective, and the amount of repairs that would be made would be marked in the book.

A juror then asked him: "When did you make that report?" He answered: "I generally make those reports in the forenoon, if I have time; if I haven't I make them in the afternoon.

The same juror asked if he made the reports in the course [66] of his examination.

Witness answered that they washed their hands first. That it was a rule of the company to keep the books clean, and they generally kept a little stub-book in their overalls and made a note of the condition when the inspection was made, and if there were any repairs they made a note of that.

That at the noon hour or previous, or at 5 o'clock, they would wash their hands and make the note.

(Testimony of J. J. Driscoll.)

That in answer to a question propounded by counsel for defendant Oregon-Washington Railroad & Navigation Co. witness testified that the inspection was generally made in the forenoon. The doors of the engines were opened at 7 o'clock in the morning and given a chance to cool off.

That in the record he had produced the facts were kept exactly as they were found when the examination was made. The record was made out without receiving instructions from anyone as to what was to be done. That the boiler-maker in charge made entries without regard to any order. That the inspections had to be made every day. He made the entries in regard to this engine the same as all entries were made.

The witness testified that the actual inspection was made as follows: That the engines usually come in in the night and the inspector went on duty in the morning. The doors were opened up when the engines had to be inspected, which had not already been inspected. That as soon as the engines had cooled off the inspector would take a torch and crawl in the front door and look around the top, and see any small holes that might be in the netting; if you find a small hole, you must take a rule and measure the size [67] of the hole, and put a patch on it, and measure the size of the patch you put on there, and make a note of that fact in the stack-book. You have to keep that record, and if the engine is O. K. you mark good, in the different portions. When you get through in the front end, it is closed; you go

(Testimony of J. J. Driscoll.)

down and inspect the ash-pans, and if there is any defect it is noted in the book and what it is that is defective, and the defect is remedied before the engine is allowed to leave the house. It don't matter how bad they need an engine, they do not allow it to run or leave unless that defect is remedied. They hold it until the defect is remedied. They won't let it go out if there is a chance of any fire; that is one of the rules.

Witness testified that he is not in the employ of the company now. That he had not been in its employ since a strike on October 1, 1911. That all of the boiler-makers have remained out ever since.

That engine 527 in its fire apparatus, etc., was about the same as other engines. All of them were new. All the engines in the house at that time and for two or three months previous were new.

On cross-examination witness testified that he examined all the engines that came in during the month of July, 1911. That he examined engines No. 39, 201, 202, 204 and on down to 227 and 526. That he found all these engines in perfect condition, good condition.

Engines 201 to 208 were oil-burners, the rest were coal-burners. The oil-burners did not need much examination.

That the book would be written up, depending on the circumstances [68] and the amount of work in the shop. That if there was not much to be done it would be written up previous to noon; if there was much to be done it would be written up previous to

(Testimony of J. J. Driscoll.)

quitting time—5 o'clock. That he wrote that up from notes he made of engines at the time he inspected them.

On redirect: That the notes that he had used in his testimony were correct.

**[Testimony of T. L. Hopper, for Plaintiff.]**

T. L. HOPPER at this time was called as a witness on behalf of plaintiff.

He testified that he was living at South Tacoma on the 15th day of July, 1911, just across the street from the Mentzer mill. That he saw the mill burn. That he did not know the time. It was along towards morning, but wasn't daylight. That nobody called his attention to the fire. That when he first saw the fire it was on top of the roof. The two-story part of the building is at the north end of the mill—the small building was the dry kiln.

When he first saw the fire he would say it was at the north end of the mill, and a bit towards his house. He was on the opposite side of the street from the mill and the wind was kind of blowing towards his house. That he was living on Washington Street.

That he did not pay much attention to looking underneath the mill. He saw the fire on top. That he did not notice any fire below on the ground.

On cross-examination the witness testified that there was not anything that *call* his attention to the fire. He was sleeping and when he waked up everything was light and he got up to see what the matter was. [69]

(Testimony of T. L. Hopper.)

That he slept downstairs and the witnesses Ebert and Bergardis were sleeping upstairs. That he did not know whether they were up when he got up. That he didn't think Ebert was but he would not be certain. That he did not get up.

That he heard someone talking at this time upstairs; that is, a few minutes after he noticed the fire.

That he went down to the fire. That he didn't know who was at the fire when he got there. That there were quite a number there. That he didn't think the fire department was there when he first got there, but still it might have been. He would not say whether it was there when he first went out.

That he first noticed the fire coming up from the comb of the second-story part of the building, about the middle and a little to the north of the center. He thought the one-story part of the building was more than fifty or sixty feet long. That he thought the fire was on the west side of the building, kind of coming over the roof. That he didn't notice any fire in the two-story part of it and he didn't notice whether the roof of the two-story part was burning or not.

That there was not much wind blowing that night.

**[Testimony of R. M. Wasson, for Defendant Oregon-Washington Railroad & Navigation Company.]**

R. M. WASSON, called as a witness on behalf of defendant Oregon-Washington Railroad & Navigation Co., testified that he was a locomotive engineer, and had been such for fifteen years; was in the em-

(Testimony of R. M. Wasson.)

ploy of the O.-W. and was in its employ in July, 1911, and was in charge of that train which passed South Tacoma at 1:43 on the 15th of July, 1911, and the number of the engine was 527; the train was a freight, the class of engine the 500-class Mikado type. It was a new engine—only in the service the last of June or in June, 1911. [70]

On this trip the train was going from Tacoma to Portland, Oregon. That he operated it on leaving South Tacoma in the usual and ordinary manner. That nothing unusual happened to the spark-arrester or anything in connection with it before reaching South Tacoma or before he reached the mill.

That the engine and apparatus worked the same as all engines and apparatus worked on all of the trips and when the engine was in good repair.

That there was nothing out of order with the spark-arrester or fire apparatus or anything connected with it.

That the size of the train was probably 980 tons. That this was all an engine could take up the hill to Bailey Street, that is, without helper, and that the Oregon-Washington road only maintained one engine in Tacoma as a helper.

That the 500-type engines are rated 500-tons on this Tacoma hill. That the helper engine is rated at 480, making 980 tons we probably had in the train. There was not more than that. There might have been a little less. There was probably in that train about twenty loaded box-cars or something like that.

That he was familiar with engine 527, the same as he was with all engines of the 500-class. That

(Testimony of R. M. Wasson.)

he had ran one of them regularly all the time. That he considered the engine an extremely safe engine as far as throwing out sparks, etc., was concerned, on account of the extremely large nozzle those engines are equipped with and the large heating surface of the fire-box and the size of the netting, etc.

That he would consider it a great deal safer than a majority of the engines used. That he did not observe that this engine emitted any large sparks or atoms or materials after [71] *after* leaving South Tacoma. There was nothing out of the usual. That all engines would throw up some sparks, all coal-burners at times, but that he did not notice anything *usual* or any large amount of sparks escaping at all.

That he would have been able to notice if there was something unusual in the action of the engine.

On cross-examination witness testified that he was familiar with the kind of coal used on these engines. That it was a lignite coal, very light, and lighter than that used on the Northern Pacific. That it was not necessarily on account of the coal used that the large nozzle was required on the companies' engines. That idea was that this coal did not require the draft that a heavier and harder coal would. It did not require the draft, could be worked with a smaller draft and small netting. That the coal was not fine, but was lump coal, but that it was soft coal or light coal.

That small meshes could be used with this soft coal—smaller than on coal where a heavier draft was required and that a large fire-box and heating surface

(Testimony of R. M. Wasson.)

could be used. He did not think the light coal threw out more sparks than the hard coal—at any rate not in these engines.

If this coal was burned in one of the N. P. engines which are equipped for harder coal and for a stronger draft it might possibly throw out more sparks. He had never seen it tried. That he knew that wood used in an engine would throw out more sparks than coal. That it was because it was a different material. That probably the harder the coal the less sparks would be thrown out; and the harder the substance used for combustion the fewer would be the sparks under the same conditions. [72]

That when asked on cross-examination if, in using a lignite coal, sparks would be thrown out of a smaller break in the netting than as though you used heavier coal, the witness answered: “Well, it would under the same conditions, probably. I never saw this demonstrated. I am just giving my idea.”

On redirect the witness testified that the size of the meshes in engine 527 was what was known as 7x7. Seven holes to the square inch, or so.

**[Testimony of L. Frank Gordon, for Defendant.]**

L. FRANK GORDON, called as a witness for defendant Oregon-Washington Railroad & Navigation Co., testified that he was claim agent for that company. That he had been looking after the trial of this case. That he did not know where Mr. Fred Zintz was and had been unable to find him.

That Zintz was present at the last trial and was one of the inspectors. That he had made inquiry to



(Testimony of L. Frank Gordon.)

ascertain his whereabouts and had gone to Portland for that purpose, and had not been able to find Zintz at all since the last trial. That Portland was where Zintz formerly lived and was employed.

[**Testimony of J. A. Donovan, for Defendant Oregon-Washington Railroad & Navigation Company (Recalled).**]

J. A. DONOVAN, recalled as a witness on behalf of Oregon-Washington Railroad & Navigation Co., testified that he knew Mr. Zintz, the boiler inspector. He was shown the entries in the book from which the witness had previously testified as to inspections made by him, and asked in whose name two entries on that page were that were not in his handwriting. He stated that the signatures to those two entries was that of Fred Zintz. That Zintz occupied the position of night inspector for the nettings, ash-pans and spark-arresters equipment.

That this handwriting resembled Mr. Zintz' signature. [73] That the entry shows that on the 12th day of July, 1911, the condition of the smokestack and netting were good and was signed Fred Zintz, Inspector. A juror asked on what engine, and the witness replied engine 527.

Then testifying to another entry witness then testified that on July 20, 1911, the entry showed condition of smokestack and netting good, of ash-pan and netting good, signed Fred Zintz, Inspector. That on July 31, 1911, entry showed engine 527, condition of smokestack and netting good, ash-pan and netting good, signed Fred Zintz, Inspector.

(Testimony of J. A. Donovan.)

Thereupon the defendant Oregon-Washington Railroad & Navigation Co. offered in evidence the testimony of Mr. Zintz, taken at the last trial of this case. That is a copy as transcribed by the stenographer.

The plaintiff objected on the ground that it was not admissible, incompetent, irrelevant and immaterial, but stated that they did not object on the ground of its being a transcript.

Plaintiff also further objected on the ground that it was not shown that the defendant could not get the deposition of the witness. The objection was overruled and an exception allowed plaintiff.

Whereupon the testimony of Mr. Zintz given at the former trial was read to the jury, which in substance is as follows: [74]

**[Testimony of Fred Zintz, for Defendant Oregon-Washington Railroad & Navigation Company.]**

(By Mr. SULLIVAN.)

Q. You were employed by the Oregon-Washington Railroad & Navigation Company during July, 1911? A. Yes, sir.

Q. In what capacity? A. Boiler-maker.

Q. What were your duties?

A. My duties were to inspect front ends of the engines and the ash-pans and netting.

Q. Did that include that apparatus to prevent the escape of cinders and so forth? A. Yes, sir.

Q. Do you remember whether you made an inspection of engine No. 527 during the month of July, 1911?

(Testimony of Fred Zintz.)

A. I could not remember, not unless I saw the book.

Q. Did you make an entry of it in a book you kept?

A. Yes, sir.

Q. I call your attention to entries on the 12th of July, 1911, and ask you in whose handwriting those entries are?

Mr. HODGE.—I object to that as incompetent; no identification of the book has been made.

Q. Is that the book you refer to as being kept?

A. Yes, sir, this is the book.

Q. Now, I renew my question.

A. This is my handwriting, on the 12th of July and on the 20th and on the 31st of July.

Q. Now, can you state what was the condition of that apparatus or meshing and spark-arresters and so forth on those dates? [75]

Mr. BEDFORD.—From your own memory?

Mr. SULLIVAN.—No, by refreshing your memory.

A. I found them in good condition.

Q. Does that include all three days, including the 31st of July? A. That includes all three of them.

Q. This engine 527, do you know whether or not it was a new or old engine at the time?

A. It was a new engine; well, not exactly new, but only a couple of months old; they only came in lately.

Q. What class was these engines called?

A. We called them the Mikado class.

Q. The 500 class? A. The 500 class.

Q. They all have the same class of spark-arresters,

(Testimony of Fred Zintz.)

meshings and so forth?

A. Yes, sir, that class all have the same netting and spark-arresters, ash-pan and so forth.

Q. What was the netting called, the general designation? A. We usually called it 7x7 mesh.

Cross-examination.

(By Mr. BEDFORD.)

Q. Without looking at this book, after you have seen it, now, can you remember of your own memory and knowledge as to the condition of any one of those engines you examined during the month of July?

A. Well, I could not state any particular engine of my own knowledge, because I have examined them right along and could not exactly say which engine it was, or which month, of my own memory. [76]

Q. Then so far as your memory goes, you have no memory of any particular engine or the inspection of it during the month of July?

A. No, not without the book.

Q. And even in looking at the book it don't bring to your memory anything regarding the engine, only from the fact that you put it down, and so must be so because you put it down?

A. Well, that is the only memory I have.

Mr. BEDFORD.—I move to strike the answers as to the engine being in good condition at that time.

The COURT.—Motion denied; it seems that it is a book kept in the course of business; exception allowed.

Q. Wherever you put the word "good" down here, that means what?

(Testimony of Fred Zintz.)

A. That means that the engine is inspected and found in first-class condition; that no repairs are needed.

Q. Then if all of the engines are marked good during that whole period, then that means that no engines were found out of repair during July?

A. That means they were found O. K.

Q. Isn't it a fact that all of the entries in this book are good?

A. Well, I could not tell. If there was any work done or repairs on the engine it is stated in that book.

Q. What do you mean by 7x7 mesh?

A. That it has seven squares to the inch of the wire, it is a wire netting; seven squares to each inch.

Q. That is you have seven wires running each way to the inch?

A. Yes, sir, seven holes to the inch. [77]

Q. What is this mesh; is it wires or sheet metal stamped? A. It is made of wire.

Q. How thick is the wire?

A. I would judge somewhere around not quite  $1/16$ th.

Q. About  $1/16$ th?

A. Somewhere around there; that wire goes by numbers.

Q. As near as you can get it it is about  $1/16$ th?

A. Yes, sir.

Q. That would make each inch  $7/16$  solid wire scarred over the inch? A. Yes, sir.

Q. Then the balance would be equally divided in these seven spaces? A. Yes, sir.

(Testimony of Fred Zintz.)

Q. Consequently nothing larger than that, 1/16th, or 1/2 of the 1/16th could get through those meshes?

A. Well, as I recall, nothing larger than the end of a small match might get through.

Q. Then no sparks of any size, or lasting any distance could possibly get through that mesh if it is in proper condition?

A. Nothing can get through there to get up to any height, if it is in good condition.

Q. But if sparks larger than that went through to any height or distance, it would show that the mesh was not in good condition, wouldn't it?

A. Yes, sir.

Redirect Examination.

(By Mr. SULLIVAN.)

Q. I hand you this piece of netting, and ask you if that is the kind of netting which was used on these engines? [78]

A. Yes, sir, this is the kind of netting.

(Marked Identification No. 1.)

The COURT.—When with reference to the inspection of the engine is the record made?

A. So soon as the engine is inspected, maybe ten minutes; they are entered right away so that nothing is forgotten.

(Witness excused.) [79]

[Testimony of R. M. Wasson, for Defendant Oregon-Washington Railroad & Navigation Company (Recalled).]

R. M. WASSON was recalled for further examination and was asked how far sparks would go through

(Testimony of R. M. Wasson.)

a 7x7 netting if in good repair. To which the witness answered: "Well, that depends on the condition. On the condition of the fire, the condition of the speed of the train, the wind, etc. You would have to give me an example.

Then he was asked the following question: With your netting in good repair, will sparks shoot up through that netting high enough to be carried by a light wind 80 or 90 feet, falling upon combustible material and ignite that material. To which the witness answered: No, sir, not if the netting is in good condition.

On redirect the witness testified that the top of the smokestack of the engine from the level of the ground or the rails of the track was 16 feet 6 inches.

**[Testimony of W. A. Perley, for Defendant Oregon-Washington Railroad & Navigation Company.]**

W. A. PERLEY, witness for the defendant Oregon-Washington Railroad & Navigation Co., testified that he was a special representative of the mechanical department of the O.-W. R. & N. Co., and that he had been acting in that capacity for fifteen months. That for five years prior to that time he was State Railroad Inspector for the Public Service Commission of the State of Washington. That his duties in this capacity were to look after the equipment, track and practical operation of the railroads and investigate accidents.

Prior to the time when he was in the employ of the State he had been a locomotive engineer, master mechanic and traveling engineer. That ever since 1876

(Testimony of W. A. Perley.)

He had been connected with the mechanical departments of railroads with the exceptions of the five years he was with the State commission.

That he was familiar with engine 527 and this class [80] of engines. That this engine was turned over to the defendant company in May, 1911, and was put in service the latter part of May or the first part of June, 1911, just as soon as they could get them into condition.

He testified that these engines are modern freight engines designed by the Harriman people, and had an exceptionally large fire-box heating surface and large nozzle. They were up to date in every way. Had automatic ash-pans. That the ash-pan netting he had been talking about was on nearly all the modern engines. There is a space left between the moot ring and part of the ash-pan that is opened in order to admit air to the fire, and that it was covered by the netting when the engine was in motion, to keep the fire from falling out. The ash-pan was made concave, and while there was little liability of coal falling out in that place, they have it covered with netting to avoid the possibility.

That these engines were first-class engines, and that the type of fire-box and large number of flues and large boiler capacity enable these engines to be operated with a much larger nozzle than the older engines with less draft. That he thought they were just as safe as any engine in the State for fire.

Witness was here shown a model of the class of engine to which engine 527 belonged.

The witness then described in detail from the



(Testimony of W. A. Perley.)

model the operation and construction of the fire apparatus, etc., stating that the model represented the front end of the Mikado type of engine and the flues and fire-box, etc., and stated that all the cinders, smoke and everything came through the flues. [81] That the steam from the cylinders after it had performed its function was conducted into the atmosphere through a nozzle, that fills the stack, and in passing through with great velocity it takes out the air and forms a vacuum in the front end, that made the draft.

That the cinders, gas and smoke passing through the flues struck a deflecting plate and are deflected down against the back of the smoke-box. Then the cinders and smoke would go up against the 7x7 netting, and the successive exhaust pound them up and down and break them up until they are fine enough to go through the 7x7 netting. That netting is a netting with seven openings to the square inch.

Witness was here shown a piece of netting and stated that it was a 7x7 netting, stating that it being difficult to put in that size of netting in his model and the small wire netting was used in the model instead of that shown to him.

A juror asked the witness if this netting did not burn out pretty fast. The witness answered: Not in that type of engine. That with the large area of netting and large exhaust there was no trouble with any of this netting; that it lasted for months.

Whereupon the model referred to by witness was introduced in evidence as exhibit No. 2.

Witness testified that this netting would last for

(Testimony of W. A. Perley.)

months. That the defendant company's road operated through a very dry country in some instances, and in order to protect the interests of the company a very rigid smokestack and ash-pan netting inspection had been adopted all over the Harriman system. [82] That all engines were inspected every trip and a record was kept of their condition, because the company's engines operated through a wheat country in Eastern Washington, where the crops were growing right along the rails, and it was a standing rule of the company that these engines should be inspected every trip at the round-house.

Asked how it was as to its deflectors and capacity to stand the wear and tear, the witness stated that this engine 527 was as well equipped with spark-arresting device, as it was possible to equip an engine and operate a train. One could not cook his breakfast with the pipe stopped up and a train could not be operated without draft. When there was draft there would be sparks.

That these engines were designed for burning lighter coal than the Northern Pacific burned.

That one engine was designed, number 500, and the Harriman mechanical representative came out from New York and adopted it and other roads are adopting it. That the Great Northern has some new ones. Owing to the exceptionally large fire-box, which is larger than any locomotive built up to that time, the large number of flues gives such a great heating surface that they can run a much larger nozzle than the ordinary nozzle. That experience

(Testimony of W. A. Perley.)

has taught that the use of this type of engine was practical. Absolutely so. That they have given greater satisfaction.

That on other types of engine they use a 4x4 netting in the winter-time. In the opinion of witness, this engine 527 was equipped with the most modern and safest appliances it was possible to operate under. That he was familiar with the tests that were made when the 3x3 netting was adopted [83] in this State. The netting used by the Northern Pacific.

The witness stated that the standard size netting was 3x3. That the various mechanical representatives of the railroads met with the State Fire Warden at Olympia and fixed upon the 3x3 netting as standard, and this was in general use on the engines of the Northern Pacific, and that the Northern Pacific also used 4x4 netting and the Great Northern used that with a perforated plate that is between the 3x3 and 4x4.

That the engines of the Northern Pacific of the 2100-class were not as new a design as the 500-class of the O. & W., and that the 7x7 netting with the class of coal used by the Northern Pacific could not be used on the Northern Pacific engines. That fires would inevitably be started. That this had been the history of railroads ever since they operated engines.

On cross-examination witness was asked what kind of coal was it that netting was not needed with. That there was a coal used on the division south of

(Testimony of W. A. Perley.)

Spokane which comes from Alberta and in testing for sparks at night he had ridden on the hind end of a train and did not see a spark. That he really did not think it was necessary to use a netting. That the O.-W. Company used lignite coal between Seattle and Umatilla and through this section.

That he was not one of the commission that adopted the 3x3 netting—he was simply conversant with the fact.

The witness was asked on cross-examination the following question: With the 7x7 netting, a train passing the side of the mill building within 80 or 90 feet of the building, and a spark passing through that netting, if that netting was in perfect condition, could fire be thrown as far as that building, [84] and ignite combustible material?

To which witness answered as follows: Well, that would simply be a matter of opinion on my part. You can take the netting and look at the hole through there, and a very, very small spark, if the netting was in proper condition, it would have to be a very small spark to be emitted. In my opinion, it would not retain sufficient heat at that distance.

Witness also testified that in his opinion ninety feet outside the right of way, if a spark went that distance, it would not indicate that the spark-arrester had a hole in it of some kind to let the spark through.

He also testified that the smaller the nozzle the more intense the draft. That on account of the great volume of steam, the more it is contracted the

(Testimony of W. A. Perley.)

greater the velocity. It was a soft exhaust, just enough to move gases through the fire box.

That the 7x7 mesh was not made of as big wire as the 4x4 netting.

On redirect the witness testified that the distance a spark or any other object would be carried through the atmosphere would depend to a large extent upon the velocity of the wind—whether there was any wind. That when the engine was going straight ahead, with no wind, the sparks would go straight up in the air and the train running along they would fall back on the cars. [85]

**1 [Testimony of William Fettig, for Plaintiff (in Rebuttal).]**

WILLIAM FETTIG was called on behalf of the plaintiff in rebuttal, and testified that he had been engaged in the shingle business for the last ten years, except during the last few years he had not been active.

That his business called him in and about sawmills a good deal and he had had occasion to observe fires about mills started by sparks. That a spark might smolder in the dust and sawdust which would accumulate on the top of a mill building and away from a breeze, but a spark either went out or blazed up and ignited the building for a period of anywhere from minutes to hours, depending upon the kind of material gathered there and the kind of sawdust and the wind, etc.

That he had observed where a spark had gone in sawdust or dust accumulation after a length of time.

(Testimony of William Fettig.)

The witness was asked the following question: "Calling your attention to the mill building in the month of July, when it is dry, where dust and sawdust has accumulated on the roof, the building being constructed as shown by Plaintiff's Identification "B," how long might a spark under those conditions lie at the place on the roof of that building marked with an X, when the wind was in the northeast and did not strike this spark?"

This was objected to as incompetent, irrelevant and immaterial and too general, and not based upon any facts in the case, by the respective attorneys for defendants.

The Court overruled the objection, each of the defendants excepted, and each of the exceptions were allowed.

The witness answered: "It might lie there for hours. [86]"

On cross-examination witness testified that he was now in the real estate business and had been in this business for three or four years.

That it had been several years since he was engaged in the shingle business at Buckley. That he was in that business at Buckley on and off for fifteen years. That his mill never burned down at all. That he had operated one saw-mill and three shingle-mills at Buckley. That none of these had burned.

That he was connected in Tacoma with a gentleman named Busselle. That he had an office alongside of plaintiff in Tacoma.

That he had never had any experience with mills

(Testimony of William Fetting.)

being burned by sparks from engines.

That he did not know anything about nettings or spark-arresters or engines or what they might or might not do.

On redirect the witness testified that he had not in any manner been connected with plaintiff in business.

**[Testimony of L. L. Doud, for Plaintiff (in Rebuttal).]**

L. L. DOUD, witness called in rebuttal for plaintiff, testified that his business was lumber. Had been that since 1900. That in this business he had had occasion to observe the action of fire and sparks on sawdust and dust accumulated about the mill.

Witness was then asked, on direct, the following question: "I will ask you, where a mill is constructed as shown by Plaintiff's Identification 'B' and a spark should fall on the roof of a building where there is dust and sawdust accumulated, in the month of July, when it is dry, the spark being out of the way of the wind, how long that spark might remain there in this dust and sawdust before going out or igniting material [88] of the mill building?"

The witness answered as follows: "In my opinion it would depend, of course, entirely on the collection on the roof; it might be a few minutes and it might be a long time that it would remain there before it would go up."

Witness also stated that what he meant by a long time was several hours—half a day. That he would figure from the condition of the stuff that collected

(Testimony of L. L. Doud.)

on the roof. It might create a condition in a place where it would remain several hours; depending entirely on the stuff on the roof and the wind.

On cross-examination witness stated that he did not know anything about the condition of this building in 1911, or the roof. That he did not know what the suit was about until he came into the room.

That it would depend largely upon whether there was a wind or not as to how quickly it would ignite.

That he had never seen this building.

That it would also depend largely upon whether the mill was dry or not and how thick the dust was.

That in his experience around sawmills it would depend upon the collection on the roof. That there was always more or less stuff lying around mills, from the fires and stacks, and it creates different kinds of collections.

That if everything was exceedingly dry sawdust and dry shingles it would start very quick, depending a good deal on whether in the middle of the day or at night.

The Court then inquired as follows, regarding the witness Zintz: "Is there any objection to lack of notice?" Mr. Hodge, one of the attorneys for plaintiff, stated, "We will withdraw [87] our objection to the introduction of that testimony."

The Court answered, "Very well."

Mr. Bedford, one of plaintiff's attorneys, then read from the World's Almanac, showing that on Saturday July 15th, sun rose at 4:35 and twilight commenced at 2:14 A. M. [89]



[**Motion of Oregon-Washington R. R. & Nav. Co. for a Directed Verdict (Grounds of Motion).**]

At the close of the evidence, and at the proper time, the defendant Oregon-Washington Railroad & Navigation Company moved the Court for a directed verdict in its favor upon the following grounds:

1.

That the evidence was insufficient to justify a verdict against it.

2.

That there was no sufficient testimony showing that this company was guilty of any negligence in the operation of its engines or that its engines were negligently constructed or equipped.

3.

That there was no sufficient evidence to show that any fire was started by reason of any sparks emitted by defendant's engine.

4.

That the plaintiff having sued upon a joint cause of action alleged against both defendants, and having proved, if it had proved anything, a separate act by each defendant, is not entitled to maintain this action.

This motion was denied by the Court, to which ruling the defendant Oregon-Washington Railroad & Navigation Company excepted and the exception was allowed.

The defendant Northern Pacific Railway Company also made an identical motion as the above, which motion the Court denied to which ruling

the defendant Northern Pacific Railway Company excepted and the exception was allowed. [90]

---

**[Instructions Requested by Defendant Oregon-Washington R. R. & Nav. Co.]**

At the proper time and before the cause was submitted to the jury, the defendant Oregon-Washington Railroad & Navigation Company requested, in writing, that the following instructions be given to the jury:

This action is brought by the plaintiff to recover damages to his property by reason of the same having been burned by a fire which plaintiff claims was communicated to the property by means of sparks from one or both of the engines of the respective defendant companies. Plaintiff alleges that each of the defendants was negligent, in that its locomotives were so carelessly and negligently constructed, and were so carelessly and negligently operated by their servants and agents that sparks were emitted therefrom, which sparks fell upon and about the building in which plaintiff's property was located and setting fire thereto. You will observe plaintiff claims that each defendant and both of them were negligent in two particulars:

First: In that the engines of the defendants were carelessly and negligently constructed.

Second: In that the engines were carelessly and negligently operated, so that sparks were caused to be emitted therefrom. [91]

2.

In order to recover against the defendant, The

Oregon-Washington Railroad & Navigation Company, the plaintiff must prove:

First: That the property was destroyed by fire.

Second: That this fire was set out and started by a spark or sparks from one of said companies' engines.

Third: That the engine was either defectively constructed so that it would emit sparks of such a character that the same could be provided against by the exercise of ordinary care and caution on the part of the company, or that the engine was so carelessly and negligently operated by the servants and agents of defendant company that it would emit sparks of such a character that it could have been provided against by the exercise of ordinary care and caution on the part of the defendant company.

3.

It is a matter of common knowledge that locomotive engines in which coal or wood are used as fuel will emit a certain amount of sparks, and that there has been no device adopted, by which all of the sparks generated in an engine will be arrested but that some of them will escape, although the engine is equipped with spark-arresters on an approved pattern, and the engine operated by servants who are personally skillful and careful.

4.

In order to find the defendant, The Oregon-Washington Railroad & Navigation Company, negligent in the particulars mentioned, it is necessary for you to find, not only that sparks escaped from its engines, but you must go further, and find that these

sparks which did escape were caused to escape by reason of the defective construction of the engine from which they escaped, or by reason of its negligent operation, and, unless you find such to be the fact from the evidence, it is [92] your duty to return a verdict for this defendant, even though you should be of the opinion that the fire was started by a spark or sparks thrown off from the passing engine of the defendant.

## 5.

It will not be necessary for you to consider the negligence of the defendant The Oregon-Washington Railroad & Navigation Company at all until you have first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company. If the fire started in any other way, or if the preponderance of proof does not convince you that it started from an engine of this company, then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company, and it is not necessary for you to consider any other question in the case, and you will return a verdict for the defendant, The Oregon-Washington Railroad & Navigation Company.

## 6.

You are not allowed to speculate how the fire originated, but it is for the plaintiff to show that the fire started from sparks emitted from an engine of the Oregon-Washington Railroad & Navigation Company, and if the plaintiff has failed to do so, then your verdict must be for the defendant, The Oregon-

Washington Railroad & Navigation Company. [93]

## 7.

You are also instructed that the defendant, The Oregon-Washington Railroad & Navigation Company, is not responsible for any act of the defendant The Northern Pacific Company, or of any of its officers, agents or employees in the operation of the engines of said company or otherwise.

## 8.

You are further instructed that if the evidence is balanced as to whether the fire was caused by sparks from an engine of the defendant, The Oregon-Washington Railroad & Navigation Company, or sparks from an engine of the defendant, The Northern Pacific Railway Company, if you find that the fire did originate from sparks from an engine at all—then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company, for in that case there would not be a preponderance of evidence that the defendant The Oregon-Washington Railroad & Navigation Company was guilty of any negligent act.

## 9.

You are further instructed that the defendant, The Oregon-Washington Railroad & Navigation Company, being engaged in the operation of a railroad, that it is its duty under the law to operate its trains upon the tracks, and that if the engines are equipped with spark arresters of an approved pattern, and the spark arresters were in good condition, and the engine was operated in an ordinarily skillful manner, then the defendant has performed its full duty under

the law and would not be liable to plaintiff even though sparks from its engines caused the fire which destroyed plaintiff's property. [94]

## 10.

A party is not entitled to recover merely because a fire has been started from sparks from an engine of a railroad company. There must be negligence alleged and proved either in the construction of the engine or in its operation.

## 11.

A railroad company is not an insurer of the safety of property along its line, and could not be held liable for the destruction of property by fire even though such fire is caused by sparks from its engines, unless the engine was improperly constructed or negligently operated, and this must be shown by a fair preponderance of the evidence.

## 12.

The mere fact that a building close to or adjacent to the right of way of a railroad company was burned raises no inference of itself that the fire was caused by an engine of the railroad company, and the fact, if it be a fact, that the engine of the railroad company emitted sparks, would not be sufficient to show that the fire was caused by sparks emitted from the engine of the railroad company.

## 13.

The burden of proof is upon the plaintiff throughout the entire case, and he must establish by a fair preponderance of the evidence all of the facts which he is required to show to entitled him to a verdict.

## 14.

If you find for the plaintiff he would be entitled to recover the fair reasonable market value of his property at the time of its loss and no more. You cannot allow a speculative or imaginary value, or anything beyond the reasonable market value of the actual property destroyed, and you are to determine this from all the evidence and are not bound by the evidence of any witness in relation thereto.

## 15.

There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned. The Court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case.

## 16.

While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire.

## 17.

The fact that this train did pass the premises going [96] north at the time it did is permissible to be

considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company.

18.

You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 A. M. then your verdict must be for the defendants.

19.

If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 A. M., July 15, 1911, then your verdict must be for the defendants. [97]

---

**[Instructions Refused.]**

The Court refused to give instruction No. 15 asked for by said defendant, which instruction reads as follows:

There was some evidence introduced by plaintiff as to fire originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned. The Court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 16 asked



for by said defendant, which instruction reads as follows:

While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 17 asked for by said defendant, which instruction reads as follows:

The fact that this train did pass the premises going north at the time it did is permissible to be considered by [98] you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 18 asked for by said defendant, which instruction reads as follows:

You are instructed that if you find that the fire

was not discovered by the witnesses until about 3:30 A. M., then your verdict must be for the defendants.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court.

The Court refused to give instruction No. 19 asked for by the said defendant, which instruction reads as follows:

If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 A. M. July 15, 1911, then your verdict must be for the defendants.

To the refusal of the Court to give this instruction each of the defendants separately excepted and the exceptions were allowed by the Court. [99]

### **Charge to the Jury.**

The COURT.—Gentlemen of the Jury: The arguments of the case being concluded, the Court will instruct you concerning the law before you go out for consideration of your verdict.

You will take with you the pleadings in this case, which consist of the amended complaint filed by the plaintiff, and the answer of each of the defendants, and you are expected to examine them in order to determine what one side alleges and the other side admits or denies. Briefly, as you will gather by this time, the plaintiff complains of the defendants and charges that both of them were careless and negligent in the manner of the construction of their engines and the manner of operation over this line of road, and because of that his mill was burned down.

The defendants each deny this negligence, this

carelessness charged against them by the plaintiff. That makes this suit what is known as a suit on account of negligence. Negligence is known in the law and defined as the want of ordinary care. Ordinary care is defined as that care which would be exercised by an ordinarily careful and prudent person, having regard to the consequences reasonable to be apprehended from the want of proper prudence. The law is that every person, not only railroads but every person, must exercise ordinary care in the use of his property so that the property of others may not be injured. If a person fails to exercise ordinary care in the use of his property and that [100] failure to exercise ordinary care on his part is the proximate cause of injury to someone else, he is responsible. That is the general statement of the law of negligence. But before the plaintiff can recover in this case, he must have shown by a fair preponderance of the evidence that at least one of these defendants was negligent, and in at least one of the things of which he complains in his complaint, and that that negligence must also be shown before the plaintiff can recover, by a fair preponderance of the evidence, to have been the proximate cause of the burning of this mill. If the plaintiff does not show that one of these defendants was negligent in at least one of the particulars of which he complains, and that that negligence was the proximate cause of the burning of the mill, then he cannot recover and your verdict would be for the defendants.

It will first be your duty to determine in this case, and you will not go outside the evidence and you will

not speculate or guess concerning any of the issues in this case, but if the evidence has shown, it will be first your duty to determine whether or not the mill was burned from sparks emitted by one of these engines, that is, one of the engines of one of the defendant companies. If you find that there is a fair preponderance of evidence showing that it was set on fire and burned down by the sparks emitted from the engines of one of these companies, it will then be your duty to pass on and determine whether either of the defendants have been negligent in either of the particulars of which [101] complaint is made by the plaintiff. If you find that one or both of the defendants were negligent in one or both of the particulars of which complaint is made in the complaint, and that that is shown by a fair preponderance of the evidence, it will then be your duty to determine whether that negligence was the proximate cause of the setting fire to the mill, and last, it will be your duty to determine and announce by your verdict, which of the defendants, or both, if you do find both negligent you so find.

As I have indicated to you in these instructions, it would not be necessary in order to justify a recovery by the plaintiff that both of the defendants were negligent, and it would not be necessary to justify a recovery that one of the defendants should be negligent in both of the particulars of which complaint is made.

It is not sufficient for a railroad company to use ordinary care in the construction of its equipment, but after it has constructed it and made it ordinarily

safe, it must use ordinary care in the operation of it.

The Court in these instructions has used the expression, proximate cause, and preponderance of evidence. As near as the Court can explain to you proximate cause, is to tell you that every person, not only railroad companies, but every person is liable for all those consequences that flow naturally and directly from his acts, but that he is not liable for consequences that do not flow naturally and directly from his acts.

Concerning the preponderance of evidence, I have told you that before the plaintiff can recover, he must [102] have shown to you by the evidence in this case which has been admitted,—and you are not to guess or surmise about what any evidence would be that was not admitted, or anything that was ruled out,—he must have shown by a fair preponderance of the evidence admitted in Court that this negligence was the proximate cause of his injury, the negligence of which he complains. That is true of every negligence case. If a party charges another in court with negligence, he must establish it in any case by a fair preponderance of evidence before he can recover, and in this case if you find that the weight of the evidence on this question of negligence is with the defendants, or that it is evenly balanced so that you are unable to say on which side the preponderance is, then the plaintiff cannot recover and your verdict would be for the defendants. Preponderance of evidence is defined as being the greater weight of the evidence, and it cannot be stated in exact use of words that evidence weighs in a material

sense; all that the Court can tell you is that evidence preponderates which appeals to your reason and your experience and understanding so as to create and induce belief in your mind; and if there is a dispute in the evidence, that it still so appeals to your reason and belief as to create and induce belief in your minds.

As has been told you by counsel on both sides, it is not sufficient for the plaintiff to show you that his mill was fired from the sparks from one of the defendant's engines. There has no way been devised for using coal for the creation of the steam in locomotives in which [103] some sparks will not escape, and if these sparks cause a fire without negligence on the part of the company that is using the engines, they are not liable. Negligence must be established and that negligence shown to be the proximate cause of the injury.

I will give you certain written instructions, and you will understand if I cover the same ground I have already covered, it is not with any intent on the part of the Court to try to emphasize particular parts of these instructions or lead you to think that those are of more importance than those which are not in the written instructions.

This action is brought by the plaintiff to recover damages to his property by reason of having been burned by fire which plaintiff complains was communicated to the property by means of sparks from one or both of the engines of the respective defendant companies. Plaintiff alleges that each of the defendants was negligent, in that its locomotives were

so carelessly and negligently constructed and operated by their servants and agents that sparks were emitted therefrom and fell upon the building in which plaintiff's property was located, and setting fire thereto. You will observe that the plaintiff claims that each and both of the defendants were negligent in two particulars, first, in that the engines of the defendants were carelessly constructed, and second, that the engines were carelessly and negligently operated so that sparks were caused to be emitted therefrom.

A party is not entitled to recover merely because fire has been started from sparks from the engines of a [104] railroad company; it must be alleged and proved that it was negligence either in the construction of its engines or in the operation thereof.

A railroad company is not an insurer of the safety of the property along its line, and could not be held liable for the destruction of property by fire even though such fire is caused by sparks from its engines, unless the engine was improperly constructed or negligently operated, and this must be shown by a fair preponderance of the evidence.

The mere fact that a building close to or adjacent to the right of way of a railroad company was burned raises no inference of itself that the fire was caused by an engine of the railroad company, and the fact, if it be a fact, that the engine of the railroad company emitted sparks, would not be sufficient to show that the fire was caused by sparks emitted from the engine of the railroad company; but these circumstances, if established, might be considered by

you with all other circumstances and conditions proven in the case in determining what the cause of the fire was.

The burden of proof is upon the plaintiff throughout the entire case, and he must establish by a fair preponderance of the evidence all of the facts which he is required to show to entitle him to a verdict.

I will give you certain written instructions which as read apply to the O. & W. R. R. Company alone. In the course of the argument, it has been mentioned, and the Court instructed you early in the case, that if the Oregon-Washington Railroad & Navigation Company was negligent [105] in the particular of which the plaintiff complained, and that that negligence was the proximate cause of the fire, the Oregon & Washington Railroad & Navigation Company would not only be liable, but the Northern Pacific Railway Company would be liable as well, because the Northern Pacific is allowing them to use their tracks in a negligent manner, but if the fire was negligently caused as complained of, by one of the Northern Pacific engines, the Oregon & Washington Railroad & Navigation Company would not be liable, because the extent of its liability is confined to furnishing proper engines and properly equipped and operated in an ordinarily careful and skillful manner, and would not in any way be responsible for the conduct of the Northern Pacific Railway Company; so that you will understand these written instructions are applicable to the O. & W. R. & N. Company; but in so far as the case turns on the charge that the Northern Pacific Railway Company carelessly equipped



its engines and carelessly operated them, the same rule applies; but because of this further liability of the Northern Pacific Railway Company in not only being responsible for its own acts of carelessness, if any have been shown, but for those of the other company, it is necessary to separate the two and instruct you on that phase of the case.

In order to recover against the defendant The Oregon-Washington Railroad & Navigation Company, the plaintiff must prove: First, That the property was destroyed by fire. Second, That this fire was set [106] out and started by a spark or sparks from one of that company's engines. Third, That the engine was either defectively constructed so that it would emit sparks of such a character that the same could be provided against by the exercise of ordinary care and caution on the part of the company, or that the engine was so carelessly and negligently operated by the servant and agents of defendant company, that it would emit sparks of such a character that it could have been provided against by the exercise of ordinary care and caution on the part of the defendant company.

It is a matter of common knowledge that locomotive engines in which coal or wood are used as fuel, will emit a certain amount of sparks, and that there has been no device adopted, by which all of the sparks generated in an engine will be arrested, but that some of them will escape, although the engine is equipped with spark-arrester of an approved pattern, and the engine operated by servants who are reasonably skillful and careful.

In order to find the defendant, The Oregon-Washington Railroad & Navigation Company, negligent in the particulars mentioned, it is necessary for you to find that not only sparks escaped from its engine, but you must go further and find that these sparks which did escape were caused to escape by reason of the negligent construction of the engine from which they escaped (that is, what the Court told you, in effect; you [107] must find that negligence is the proximate cause), and unless you find such to be the fact from the evidence, it is your duty to return a verdict for this defendant, even though you should be of the opinion that the fire was started by a spark or sparks thrown off from the passing engine of the defendant.

It will not be necessary for you to consider the negligence of the defendant The Oregon-Washington Railroad & Navigation Company at all until you have first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company. If the fire started in any other way, or if there is not a preponderance of evidence showing that it started from an engine of this company, then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company, and it is not necessary for you to consider any other question in the case, and you will return a verdict for the defendant, The Oregon-Washington Railroad & Navigation Company.

You are not allowed to speculate how the fire originated, but it is for the plaintiff to show that the fire

started from sparks emitted from an engine of the Oregon-Washington Railroad & Navigation Company, and if the plaintiff has failed to do that, then your verdict must be for the defendant, The Oregon-Washington Railroad & Navigation Company.

You are also instructed that the defendant, The [108] Oregon-Washington Railroad & Navigation Company is not responsible for any act of the defendant, The Northern Pacific Railway Company, or of any of its officers, agents or employees in the operation of the engines of said company or otherwise.

You are further instructed that if the evidence is balanced as to whether the fire was caused by sparks from an engine of the defendant, The Oregon-Washington Railroad & Navigation Company, or sparks from an engine of the defendant, The Oregon-Washcific Railway Company—if you find that the fire did originate from sparks from an engine at all—then your verdict must be for the defendant The Oregon-Washington Railroad & Navigation Company, for in that case there would not be a preponderance of evidence that the defendant The Oregon-Washington Railroad & Navigation Company was guilty of any negligent act.

You are further instructed that the defendant The Oregon-Washington Railroad & Navigation Company, being engaged in the operation of a railroad, that it is its duty under the law to operate its trains upon its tracks, and that if its engines are equipped with spark-arresters of an approved pattern, and the spark-arresters were in good condition, and the en-

engine was operated in any ordinary skillful manner, then the defendant has performed its full duty under the law and would not be liable to plaintiff, even though sparks from its engine caused the fire which destroyed plaintiff's property. [109]

If you find for the plaintiff he would be entitled to recover the fair reasonable market value of his property at the time of its loss and no more. You cannot allow a speculative or imaginary value, or anything beyond the reasonable market value of the actual property destroyed, and you are to determine this from all the evidence and are not bound by the evidence of any witness in relation thereto.

There is some evidence concerning a part of the property damages having some value after the fire. You will understand that the measure of damages is the difference between the fair market value of the property before the fire and the fair market value of the property after the fire; that is, it would be your duty to deduct, if you find under these instructions and evidence for the plaintiff, when you come to assess the amount of recovery, if you find that the property had a fair market value after the fire, it would be your duty to subtract from the fair market value you found from the evidence that it had at the time of the fire, its value after the fire. On this question of market value, all the Courts can tell you is that market value is what property brings in the open market. It has sometimes been said that market value of an article is what a man takes who is willing but not anxious to sell, when another man wants it and is willing but not anxious to buy—the

price at which they would arrive and the property would pass would be the fair market value. [110]

In this case there was some evidence admitted concerning other fires set within thirty days previous to the fire in question. You will understand that unless there is some evidence to show that those fires were set by engines of the Oregon-Washington R. & N. Company, you will not consider that evidence as in any way affecting that company, unless, as I say, there is evidence to show that those fires were set by the engines of that company or some of them.

You are in this case, as in every other case where questions of fact are submitted to you, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses. In passing upon the credibility of witnesses, the law says you should consider the demeanor of each witness who has appeared and testified before you and the manner in which they gave their testimony, whether they impressed you as testifying fairly, openly, trying to tell you all they knew about what they were asked, trying to tell you the whole truth, neither more or less, or whether they impressed you as being reluctant and evasive, trying to hold back something from you, or, on the other hand, whether they impressed you as being too willing, too prompt in giving testimony about things which they were not asked,—in other words, swift witnesses. You should also take into consideration the probability and reasonableness of each witness' testimony by itself, whether it appears to be a probable, consistent story, whether

corroborated where you would expect it to be corroborated where true, [111] or whether contradicted by other evidence; also the situation of each witness as enabling that witness, if he wanted to tell the truth, as enabling him to do so.

You will also take into consideration the interest that each witness may have been shown to have in the case, either by the manner of his testimony or by his relation to the case and the circumstances out of which it grew. The plaintiff having taken the stand in his own behalf, you will apply to his testimony the same rule that you do to other witnesses, including his interest in the case.

The Court will submit to you three forms of verdict. One finding for the defendant generally; that has no blanks in it; one finding for the plaintiff against both defendants, and one finding for the plaintiff against the defendant Northern Pacific Railway Company. As I have explained to you about this difference between the liabilities of the two companies, I do not think it is necessary to read that; counsel have dwelt upon it; but each of these last two verdicts finding against both defendants, in the one against the Northern Pacific there is a blank left in which, if you find for the plaintiff against the defendant, it will be necessary to insert the amount at which you assess the verdict.

The Court also submits to you a special finding to be returned with your verdict. If you find for the plaintiff, you will insert your answer to this question as to what engine you find caused the fire by the emission of sparks.

Mr. QUICK.—There is one instruction which I wish [112] the Court to give in regard to the proposition of negligence, in failing to use the latest device or invention.

The COURT.—Gentlemen of the jury, I think one of the jurors asked about that, and in answering I think the law was stated by counsel quite clearly. The law does not require the latest equipment. A railroad company, nor anyone, is not obliged, if the machinery they have is reasonable and satisfactory and ordinarily safe to operate with ordinary care,—there is no duty devolving upon them to throw it away and try something simply because it is new. If it is reasonably adequate and satisfactory and in reasonably good repair and operated with ordinary care, that is the extent of the duty.

When you have arrived at your verdict, you will cause whichever of these forms agrees with your verdict to be signed by your foreman, and notify the bailiff that you have agreed. Be careful to answer the interrogatory which the Court submits.

(Jury retires and then is recalled.)

The COURT.—Gentlemen of the Jury, the Court has been reminded that while I was trying to read one of these instructions, I interpolated something and failed to read it all, and to avoid any chances of mistake on that ground I will read the whole instruction to you again.

In order to find the defendant Oregon-Washington Railroad & Navigation Company negligent in the particulars [113] mentioned, it is necessary for you to find not only that sparks came from its engine,

but you must go further and find that these sparks which did escape were caused to escape by reason of the defective construction of the engine from which they escaped, or by reason of its negligent operation, and, unless you find such to be the fact from the evidence, it is your duty to return a verdict for this defendant, even though you should be of the opinion that the fire was started by a spark or sparks thrown off from the passing engine of the defendant.

You may retire. [114]

---

[**Exceptions to Instructions Given.**]

The defendants, and each of them, made the following exceptions to the charge given by the Court to the jury, before the retiring of the jury:

The defendants, and each of them, separately excepted to the charge of the Court in submitting the question of fires being started by separate engines of the defendants to the jury, on the ground that *the was* was not in accordance with the pleadings and issues in the case. Which exceptions were allowed.

The defendants, and each of them, separately excepted to that part of the charge which reads as follows:

“It will be your first duty to determine whether or not the mill was burned from sparks emitted by one of these engines, that is one of the engines of one of the defendant companies.”

Which exceptions, and each and both of them, were allowed separately.

Said exceptions being upon the ground that the



pleadings and issues in this cause did not justify the submission of this matter to the jury.

The defendants, and each of them, separately excepted to all that part of the instruction of the Court which reads as follows:

“If you find there is a fair preponderance of the evidence showing that it was set on fire and burned by the sparks emitted from the engines of one of these companies.”

Upon the ground that the same could not be submitted under the pleadings and issues in the cause.

A separate exception was allowed to each defendant. [115]

At the close of the argument the Court submitted to the jury a special interrogatory, which is given below, and also a form of verdict, on April 25, 1913, the jury returned a verdict, of which the following is a copy, omitting the title:

We the jury in the above-entitled cause, find for the plaintiff and against the Northern Pacific Railway Company and the Oregon-Washington Railroad & Navigation Company, and assess plaintiff's damages at the sum of \$3,120.

\$3,120.00

S. A. GIBBS, Jr.,

Foreman.

At the same time they returned the special interrogatory submitted to the jury by the Court with the answer thereto, which interrogatory and answer is as follows, omitting the title:

Q. If your verdict is in favor of the plaintiff, state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train

No. 301 or the engines of the Northern Pacific freight train 680 or the engine of the O. W. R. & N. freight train No. 691.

A. Fire was started by sparks from the engine of the O. W. R. & N. freight train No. 691.

S. A. GIBBS, Jr.,

Foreman. [116]

In due time, and within the time prescribed by the rules of the court, the defendant Oregon-Washington Railroad & Navigation Company duly filed a motion for a new trial, upon the following grounds:

**[Motion for New Trial (Grounds Thereof).]**

Comes now the defendant, Oregon-Washington Railroad & Navigation Co., and petitions the Court for a new trial in the above-entitled action, upon the following grounds:

1.

Insufficiency of the evidence to justify the verdict.

2.

Errors of law occurring at the trial.

3.

Newly discovered evidence material for the defendant, which could not with reasonable diligence have been discovered and produced at the trial.

Defendant assigns and claims that errors in law occurred upon the trial in the following particulars:

a. That the Court submitted to the jury the question of liability of this defendant for the tort set out in the pleadings, and the defendant introduced evidence tending to show two separate torts, one committed by this defendant and the other by its codefendant.

b. The Court erred in submitting to the jury the question of other fires; on the ground that the evidence of other fires was too indefinite and uncertain to justify the submission of that question to the jury; on the ground that there was no evidence of any negligence on the part of the defendant in setting other fires; on the ground that the testimony as to other fires related indiscriminately to this defendant and the engines of the defendant Northern Pacific Railway [117] Company and to fires of the engines of the Great Northern Railway Co., and on the ground that the evidence was not limited to fires started by the engines of this defendant; on the ground that the evidence was not limited to fires started by the engines of this defendant and by the engines of the defendant Northern Pacific Railway Company; on the ground that the testimony of previous fires was not limited so far as this defendant was concerned, to the particular engine which it was claimed caused the fire in this case; on the ground that the testimony as to previous fires simply relate to fires upon the right of way and to dry rubbish, and do not relate to or show any fires on the roof of this building or other buildings; on the ground that in this case proof of other fires was inadmissible as being immaterial and not competent evidence against this defendant.

c. The Court also erred in permitting various witnesses for plaintiff to testify as to previous fires being set out by the engines of this defendant and of the defendant Northern Pacific Railway Com-

pany, upon all of the grounds and objections made in subdivision b.

d. The Court erred in refusing to give at the close of the testimony this defendant's request for a written instruction to the jury to return a verdict for the defendant.

e. The Court erred in refusing to give instruction No. 10 requested by this defendant.

f. The Court erred in refusing to give instruction No. 15 requested by this defendant. And the Court erred in giving to the jury the modification which the Court did give of that instruction.

g. The Court erred in refusing to give instruction No. 17 requested by this defendant. [118]

h. The Court erred in refusing to give instruction No. 18 requested by this defendant.

i. The Court erred in refusing to give instruction No. 19 requested by this defendant.

j. The Court erred in submitting the said cause to the jury at all.

4.

There was no sufficient evidence to justify the jury in finding either.

a. That the locomotive of this defendant was improperly constructed or unskillfully or improperly operated or that there was any defect of any kind in the spark arresting apparatus; or that they emitted sparks or fire; or that they were not operated in a prudent, ordinary and skillful manner; or that there was any carelessness or want of care either in the construction of the locomotives or fire arresting devices or in its operation.

b. There was no sufficient evidence to justify the jury in finding that the fire alleged in the complaint, originated by reason of sparks emitted from any locomotive of this defendant.

c. The evidence did not disclose, by a preponderance or otherwise, whether the fire was caused or might have been caused, by the engine of defendant Northern Pacific Railway Company or sparks from the engines of this defendant. The evidence discloses, if it discloses that either engine may have started the fire, that either one might have started it and there is no preponderance of evidence that the fire started from sparks emitted from the engine of this defendant. [119]

d. That the evidence discloses by clear, convincing, uncontradicted and positive testimony that the engine and apparatus of this defendant was in perfect condition and that the engine was operated in a careful and non-negligent manner.

e. That there was no evidence to justify the jury in finding that this defendant was guilty of any wrong or tort towards plaintiff.

5.

This defendant also asks that the verdict be set aside and a new trial granted for the following reasons: That the witness Ebert, who testified for the plaintiff and who was the principal witness in regard to the respective engines of the two defendants throwing sparks upon the building and about it before the fire also testified in the case in which one Allen was plaintiff, which was tried immediately following this cause and in which the jury returned a

verdict for the defendant, testified in the Allen case that the train of defendant was throwing a cloud of big sparks out of the engine for three and a half blocks. His testimony in this case and the testimony of witnesses Lindsay and Guy show that all along this distance of three and a half blocks there was very dry grass and no fires were started in this dry grass from the sparks from either of these engines or at all. In this case Ebert had not testified to this cloud of sparks for three and a half blocks, and it is fair to assume that if he had that a showing that the grass on the right of way and about the same was exceedingly dry and there were no fires started in it would have caused the jury to have rendered a verdict for defendant. [120]

That it is evident from Ebert's testimony that he was simply trying to make a case out for the plaintiff and was not frank and honest.

That this defendant at no time was in any situation to know anything about what Ebert would testify to except as gathered from all his testimony at the different trials of the cause and when he testified to this cloud of sparks for three and a half blocks in the Allen case the defendant was able to show, without any particular preparation therefor, the condition of the grass on the line of the road, and even Ebert himself admitted this condition.

Furthermore, the variation of Ebert's testimony in the various trials of this cause in justice would require that a new trial be granted in this case, so that a fair and impartial jury may have all the different statements which Ebert has made under oath in the

various trials and particularly in this last trial of the Allen case, in which the jury returned a verdict for the defendant.

This defendant relies in this petition upon all the pleadings on file in the action, on the written instruction requested by the defendant; instruction given to the jury by the Court; upon the testimony of the witnesses as transcribed by the stenographer in attendance, and upon the records and notes in said cause.

6.

That the verdict was contrary to the evidence.

7.

That substantial justice requires that a new trial be granted.

The motion was denied by the Court, to which ruling the [121] defendant Oregon-Washington Railroad and Navigation Company excepted and the exception was allowed.

Service of the above exceptions admitted at Tacoma, Washington, this 19th day of July, 1913.

E. D. HODGE and  
CHAS. BEDFORD,  
Attorneys for Plaintiff.

[122]

---

**[Order Settling Bill of Exceptions, etc.].**

United States of America,  
Western District of Washington.

On this 21st day of July, 1913, the above cause coming on to be heard upon the application of de-

endants to settle a bill of exceptions in said cause, the defendant Oregon-Washington Railroad & Navigation Co. appearing by its attorneys, Messrs. Bogle, Graves, Merritt & Bogle, and Sullivan & Christian, and the defendant Northern Pacific Railway Company appearing by its attorney J. W. Quick, and the plaintiff appearing by his attorneys, Mr. E. D. Hodge and Mr. Chas. Bedford, and it appearing to the Court that the bill of exceptions was duly served on the attorneys for plaintiff within the time provided by law and no amendments have been suggested thereto, and counsel for plaintiff have no amendments to propose, and all the parties consenting to the signing and settling of the same; and that the time for settling said bill of exceptions has not expired, the same having been extended from time to time by stipulation and order of the Court for the reason that more time has been required, and it further appearing to the Court that the bill of exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions, and the clerk of the Court is hereby ordered and instructed to properly mark and identify such exhibits and attach the same thereto, or in case it is inconvenient or not practicable to attach said exhibits, to properly identify them in the cause and to forward them unattached as part of the bill of exceptions. [123]

Thereupon, on motion of defendant Oregon-Wash-



ington Railroad & Navigation Company, it is hereby ordered that said proposed bill of exceptions be and is hereby settled as true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause as a true, full and correct bill of exceptions, and the clerk is hereby ordered to file the same as a record in said cause, and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

Judge. [124]

---

### **Assignment of Errors.**

And now come the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, plaintiffs in error, and make and file this, their assignment of errors:

1.

The District Court erred in permitting the witness, John Horn, for plaintiff, to answer the following question propounded by plaintiff's attorneys to him:

“State whether or not you ever saw any other fires in this immediate neighborhood set by sparks of the engines of the defendants Northern Pacific Railway Co. or Oregon-Washington Railroad & Navigation Co. at any time just prior to or within thirty days prior to the burning of this mill”; and in not sustaining the objections of the defendant, the Oregon-Washington Railroad & Navigation Co. and the ob-

jections of the defendant the Northern Pacific Railway Company thereto;

A. Said question and the testimony sought to be elicited thereby was incompetent.

B. That it was irrelevant and immaterial;  
[125]

C. The question was too general, and included both companies in the same question, although the admitted facts in the case showed that a particular engine of defendant Oregon-Washington Railroad & Navigation Co. had caused the fire and that a separate and different engine of the defendant Northern Pacific Railway Company had caused the fire; and that plaintiff should have been limited, if the testimony was admissible at all, to fires started by each separate engine of the separate defendants.

D. That proof of fires set by engines of the respective companies is not admissible under the state of facts existing in this case.

E. That it appeared from the facts or admitted facts in the cause that plaintiff was undertaking to recover on an independent action against the Oregon-Washington Railroad & Navigation Co. as caused by a particular engine belonging to that company; and the plaintiff was also undertaking to recover for the injuries caused by the fire as being set by another and different engine belonging to the defendant Northern Pacific Railway Company, and that plaintiff was undertaking to show an independent act of negligence on the part of the Oregon-Washington Railroad & Navigation Co. for which the defendant Northern Pacific Railway Company was

in no way responsible.

The answer of the witness to the question above was: "Yes, sir."

2.

Witness having answered "yes, sir" to the above question, the following question was asked the same witness by plaintiff's attorneys:

"State the circumstances under which that fire occurred." [126]

The Court erred in not sustaining the objections of the respective defendants, and each of them, to this question, for the same reasons given and assigned to the preceding question in assignment of error No. 1.

The answer of the witness to this question was as follows:

He had seen several. That there was one set about thirty yards from the mill, and it was running pretty close to the fence where a private family was living, and he went over there and helped to put it out and also helped to put one out in the mill-yard, close to the mill four or five days before, the other probably happened a couple of weeks before.

He also testified on cross-examination that he did not remember the dates when he saw the fires preceding the day of the burning of the mill,—it might have been two weeks before. That he did not know what company the freight engine belonged to. He thought it was an Oregon-Washington. He did not know whether it was a Northern Pacific, or it might have been a Great Northern.

3.

The Court erred in permitting the witness Anna D.

McCarthy to answer the following question propounded by plaintiff's attorneys:

"Now, state to the jury whether or not you ever saw any other fires set by the Oregon-Washington and Northern Pacific Railway engines in this immediate vicinity and within about thirty days prior to the happening of this fire." And in not sustaining the objections of the respective defendants thereto for the same reasons given above in assignments of error number 1 and 2. [127]

To the above question the witness answered: "Yes, every few days I would see fires but they did not amount to much, because it was either put out by the engine-men themselves, or section-men, or the neighbors used their hose and put them out along where I lived."

## 4.

The Court erred in permitting the witness J. D. Banker to answer the following question propounded by plaintiff's attorneys, to wit:

"State whether or not at any time prior to the 15th day of July, 1911, and within thirty days prior thereto, you ever saw any fires set along the tracks and in this vicinity by sparks emitted from the engines of the Northern Pacific or Oregon-Washington Railroads," and in not sustaining the objections of the respective defendants to the question for the same reasons given in assignments of error 1, 2 and 3.

The witness, before this question was answered, was interrupted by plaintiff's attorneys and asked the question: State the occurrence," and in not sustaining the objections of each of the respective de-

defendants thereto, for the same reasons given in assignments of error 1, 2 and 3.

The witness answered the question: "State the occurrence," as follows: "I saw several grass fires."

Then the witness was immediately asked the following question: "Did you ever see any sparks emitted from the engines of these companies about that time?" And answered: "Yes, sir; on one particular instance I was at the mill to see Mr. Horn and a train went by and scattered considerable fire while we were on the platform; quite a lot. That at [128] this time he and Mr. Horn were on the far side of the mill from the track; on the east side of the mill. That sparks came over the mill and settled down all around them.

And in not sustaining the objection of the respective defendants to said question after the same had been amended by plaintiff's attorney by stating that he would limit the question to thirty days prior to the fire, for the same reasons given in assignments of error 1, 2 and 3.

Afterward, on cross-examination, the same witness testified relating to this matter that he supposed it was fifteen or twenty days that this occurrence happened before the fire that burned the mill. He also stated that he did not know what company's train it was, whether the Northern Pacific, the Great Northern or Oregon-Washington or what—could not say.

5.

The Court erred in permitting the witness Savage to answer the following question propounded by plaintiff's attorneys: "State whether or not at any

time, say within thirty days, prior to July 15, 1911, at or near the vicinity of this mill, you ever saw any fires by sparks from the engines of the Northern Pacific or Oregon-Washington Railroads, and in not sustaining the objections of the respective defendants, for the same reasons given in assignment, of errors 1, 2, 3 and 4.

6.

The Court erred in not granting the motion of the defendant Oregon-Washington Railroad & Navigation Co. for a directed verdict. [129]

a. For the reason that the evidence was insufficient to justify a verdict against it.

b. That the testimony did not show that said defendant company was guilty of any negligence or that its engines were negligently constructed or equipped.

c. That there was no evidence tending to show that any fire was started by reason of any sparks emitted by said defendant's engine.

d. That the plaintiff having sued upon a joint cause of action alleged against both defendants and having proved, if he had proved anything, a separate act by defendant was not entitled to maintain the action.

e. The Court erred in refusing to grant the motion of the defendant Northern Pacific Railway Company for a directed verdict in its favor for the same reasons given in subdivisions a, b, c, and d of this assignment of error No. 6.

7.

The Court erred in refusing to give instruction No.

15 asked for by the defendant Oregon-Washington Railroad & Navigation Co., which reads as follows:

“There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff’s property was burned. The Court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case.

[130]

a. For the reason that said instruction was in accordance with the law and under the facts of the case, and for the reason that the evidence was too indefinite and uncertain to constitute any proof against the defendants or either of them.

b. Also for the reason that the answers of the various witnesses for plaintiff who testified as to seeing fires within thirty days prior to the date of the fire upon which plaintiff’s cause of action was based did not disclose the engine or engines of which respective defendant caused the previous fires, and also because the testimony of all such witnesses disclosed that another railroad, namely, the Great Northern Railway Co. operated its trains over this same track, and the witnesses did not know whether these fires about which they testified were started by this latter company or by one of the other companies.

8.

The Court erred in refusing to give instruction No. 16 asked for by defendant Oregon-Washington

Railroad & Navigation Co., which instruction reads as follows:

“While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company’s freight train or the Northern Pacific Railway Company’s passenger train caused the fire.”

[131]

This was a circumstance that the jury should have been informed that it could consider in accordance with the requested instruction.

9.

The Court erred in refusing to give instruction No. 17 asked for by the defendant, the Oregon-Washington Railroad & Navigation Co., which instruction is as follows:

“The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company.” For the same reasons given in assignment of error No. 8.

10.

The Court erred in refusing to give instruction No.



18 asked for by defendant Oregon-Washington Railroad & Navigation Co., which instruction is as follows:

“You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 A. M., then your verdict must be for the defendants,” for the reason that said instruction was in accordance with the facts and law, and also for the reason that the length of time elapsing between the times when the respective engines passed the property that burned was so great under the circumstances that the fire was not discovered until 3:30 A. M., it was conclusive that the fire did not start from the engines of either of the companies.

11.

The Court erred in refusing to give instruction No. 19 [132] asked for by the defendant Oregon-Washington Railroad & Navigation Co., which instruction was as follows:

“If you believe from the evidence that the fire which destroyed plaintiff’s property did not begin until shortly before 3:30 A. M., July 15, 1911, then your verdict must be for the defendants,” for the same reasons as those set forth in assignment of error No. 10.

12.

The Court erred in submitting to the jury the question of fires being started by separate engines of the defendants, for the reason that it was not in accordance with the pleadings and issues in the case and that an action could not be maintained against the defendants jointly for individual torts.

## 13.

The Court erred in giving the jury the following instruction: "It will be your first duty to determine whether or not the mill was burned by sparks emitted by one of these engines, that is, one of the engines of defendant companies"; for the reason that the pleadings and issues in the case did not justify the submission of this to the jury, and that the plaintiff could not recover upon an independent tort committed by one of the defendants.

## 14.

The Court erred in instructing the jury as follows: "If you find that there is a fair preponderance of the evidence showing that it was set on fire and burned by sparks emitted from the engines of one of these companies," for the same reasons given in assignment of error No. 13. [133]

## 15.

The Court erred in overruling the motion of the defendant Oregon-Washington Railroad & Navigation Co. for a new trial, for the reasons given and set forth in the motion for a new trial, and for the reason of the manifest errors committed by the Court during the progress of the trial and for the reason that defendants did not have a fair and impartial trial.

## 16.

The Court erred in rendering and entering any

judgment against the defendants herein or either of them.

J. W. QUICK,

Attorney for Plaintiff in Error, Northern Pacific  
Railway Company.

BOGLE, MERRITT, GRAVES & BOGLE,  
SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error, Oregon-Washington  
Railroad & Navigation Co.

[Endorsed]: "Filed U. S. District Court, Western  
District of Washington. Jul. 26, 1913. Frank L.  
Crosby, Clerk. F. M. Harshberger, Deputy." [134]

---

**Prayer for Reversal.**

Now come the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, the plaintiff *is* error, and pray for a reversal of the judgment of the District Court for the Western District of Washington, Southern Division, in the action brought by said Cyrus A. Mentzer, plaintiff, and the defendant in error, against said Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, defendants, and plaintiffs in error herein, which judgment was entered in the office of the Clerk of said court on the 17th day of June, 1913, and was for the recovery of thirty-one hundred and twenty dollars, to-

gether with the costs and disbursements of action.

J. W. QUICK,

Attorney for Plaintiff in Error, Northern Pacific  
Railroad & Navigation Company, 1507 National  
Realty Bldg., Tacoma, Washington. [135]

BOGLE, GRAVES, MERRITT & BOGLE,  
SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error, Oregon-Washington  
Railroad & Navigation Company, 1507 National  
Realty Bldg., Tacoma, Washington. [135]

---

### Order Allowing Appeal.

Whereas, judgment was rendered in this court, on the 17th day of June, 1913, in an action wherein said Cyrus A. Mentzer was plaintiff, and said Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Co. were defendants, in favor of the plaintiff and against each of said defendants; and

Whereas, the said defendants, plaintiffs in error, as above named, have duly signed and filed a petition for a writ of error in said cause that the same may be appealed to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, said plaintiffs in error, defendants in said cause, have filed an assignment of errors, for use on appeal; and

Whereas, it is claimed that this Court committed various errors in the progress of said trial and in refusing to grant a new trial in said cause, and the Court being satisfied that it is a proper case in which an appeal should be allowed, it is hereby

ORDERED, that the appeal, by writ of error, be and the same is hereby allowed by this Court, and the Clerk is directed to issue a writ of error in accordance with the usual rules and practice of the Court.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [136]

---

**Cost Bond.**

KNOW ALL MEN BY THESE PRESENTS: That the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, and National Surety Company, a corporation, are held and firmly bound unto the above-named Cyrus A. Mentzer in the sum of One Thousand Dollars, to be paid said Cyrus A. Mentzer; for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of July, 1913.

Whereas, the above-named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, have prosecuted a writ of error to reverse the judgment of said District Court, rendered on the 17th day of June, 1913, in favor of said Cyrus A. Mentzer and against said Northern Pacific Railway Company, a corporation, and Oregon-Washington Railroad &

Navigation Co., a corporation, for the recovery of Three Thousand One Hundred and Twenty Dollars.

Now, therefore, the condition of this obligation is such that if the above named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said appeal good this obligation shall be void; otherwise same shall remain in full force and virtue.

NORTHERN PACIFIC RAILWAY  
COMPANY.

[Seal]

By J. W. QUICK,

Its Attorney. [137]

OREGON-WASHINGTON RAIL-  
ROAD & NAVIGATION CO.

[Seal]

By BOGLE, GRAVES, MERRITT &  
BOGLE,

SULLIVAN & CHRISTIAN,

Its Attorney.

NATIONAL SURETY COMPANY,

By H. P. OPIE,

Atty. in Fact. [Seal of Surety Co.]

The above bond is hereby approved as a cost bond this 26th day of July, 1913.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [138]

**Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS: That the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, and National Surety Company, a corporation, are held and firmly bound unto the above-named Cyrus A. Mentzer, in the sum of Four Thousand Dollars to be paid said Cyrus A. Mentzer; for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of July, 1913.

WHEREAS, the above-named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, have prosecuted a writ of error to reverse the judgment of said District Court, rendered on the 17th day of June, 1913, in favor of said Cyrus A. Mentzer, and against said Northern Pacific Railway Company, a corporation, and Oregon-Washington Railroad & Navigation Co., a corporation, for the recovery of Three Thousand One Hundred and Twenty Dollars.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make

said appeal good this obligation shall be void, otherwise same shall remain in full force and virtue.

NORTHERN PACIFIC RAILWAY  
COMPANY. [Seal]

By J. W. QUICK,  
Its Attorney. [139]

OREGON-WASHINGTON RAILROAD  
& NAVIGATION CO. [Seal]

By BOGLE, GRAVES, MERRITT &  
BOGLE,  
SULLIVAN & CHRISTIAN,  
Its Attorney.

NATIONAL SURETY COMPANY,  
[Seal of Surety Co.]

By H. B. OPIE,  
Atty. in Fact.

The above bond is hereby approved as a super-  
sedeas bond this 26th day of July, 1913.

EDWARD E. CUSHMAN,  
District Judge.

[Endorsed]: "Filed U. S. District Court, Western  
District of Washington. Jul. 26, 1913. Frank L.  
Crosby, Clerk. F. M. Harshberger, Deputy." [140]

---

[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States  
District Court for the Western District of Washing-  
ton, do hereby certify that the foregoing and at-



tached papers are a true and correct copy of the record and proceedings in the case of Cyrus A. Mentzer vs. Northern Pacific Ry. Co., and Oregon-Washington Railroad & Navigation Co., No. 1876C, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in said court, at the city of Tacoma, in said District.

I do further certify that I hereto attach and herewith transmit the original Citation and original Writ of Error, original Prayer for Reversal, and original exhibits.

And I do further certify that the cost of preparing and certifying the foregoing record to be the sum of \$68.70, which sum has been paid to me by the attorneys for the plaintiffs in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the city of Tacoma, in said District, this fifth day of August, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,  
Deputy Clerk. [141]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY, a  
Corporation, and OREGON-WASHINGTON  
RAILROAD & NAVIGATION CO., a Cor-  
poration,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

**Writ of Error [Original].**

United States of America,—ss.

The President of the United States of America to the  
District Court of the United States for the  
Western District of Washington, Southern Divi-  
sion, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment before you between  
said Cyrus A. Mentzer, plaintiff, and the Northern  
Pacific Railway Company, a corporation, and the  
Oregon-Washington Railroad & Navigation Co., a  
corporation, defendants, a manifest error hath hap-  
pened to the great damage of the said Northern  
Pacific Railway Company and the great damage of  
the said Oregon-Washington Railroad & Navigation  
Co., we being willing that such error, if any hath hap-  
pened, should be duly corrected and full and speedy  
justice done to the defendants aforesaid, in this be-  
half do command you, if judgment be therein given,  
that then, under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court rooms of said court in the City of San Francisco, State of California, [142] together with this writ, so that you have the same at said place, before the Justices aforesaid, on or before the 24th day of August, 1913; that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of July, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the United States the one hundred and thirty-eighth.

[Seal] FRANK L. CROSBY,  
Clerk of the Circuit Court of Appeals for the United States of America, for the Ninth Circuit.

By E. C. Ellington,  
Deputy Clerk.

The foregoing writ is hereby allowed this 26th day of July, 1913.

EDWARD E. CUSHMAN,  
Judge. [143]

[Endorsed]: No. ——. U. S. Circuit Court of Appeals, Ninth Circuit. Northern Pacific Railway Company, a Corporation et al., Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Writ of

Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 26, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

---

[Endorsed]: No. 2298. United States Circuit Court of Appeals for the Ninth Circuit, Northern Pacific Railway Company, a Corporation, and Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received August 8, 1913.

F. D. MONCKTON,  
Clerk.

Filed August 8, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and OREGON-WASHING-  
TON RAILROAD & NAVIGATION CO., a  
Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

**Citation [on Writ of Error (Original).]**

United States of America,—ss.

To Cyrus A. Mentzer, Defendant in Error Above  
Named, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States District Court for the Western District of Washington, Southern Division, wherein the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, are plaintiffs in error, and you are defendant in error, and show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 26th day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal]                      EDWARD E. CUSHMAN,  
District Judge.

Service of *with* within citation is hereby acknowledged, by receipt of copy, this 26th day of July, 1913.

E. D. HODGE, and  
CHAS. BEDFORD,  
Attorneys for Defendant in Error.

[Endorsed]: No. —. U. S. Circuit Court of Appeals for Ninth Circuit. Northern Pacific Railway Company et al., Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 26, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

---

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and OREGON-WASHINGTON RAILROAD & NAVIGATION CO., a  
Corporation,

Plaintiffs in Error,

vs.

CYRUS A. MENTZER,

Defendant in Error.

**Prayer for Reversal.**

Now come the Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, the plaintiff in error, and pray for a reversal of the judgment of the District Court for the Western District of Washington, Southern Division, in the action brought by said Cyrus A. Mentzer, plaintiff, and the defendant in error, against said Northern Pacific Railway Company, a corporation, and the Oregon-Washington Railroad & Navigation Co., a corporation, defendants, and plaintiffs in error herein, which judgment was entered in the office of the Clerk of said court on the 17th day of June, 1913, and was for the recovery of Thirty-one Hundred and Twenty Dollars, together with the costs and disbursements of action.

J. W. QUICK,

Attorney for Plaintiff in Error, Northern Pacific  
Railway Company.

Headquarters Building, Tacoma, Wash-  
ton.

BOGLE, GRAVES, MERRITT & BOGLE,  
SULLIVAN & CHRISTIAN,

Attorneys for Plaintiff in Error, Oregon-Washing-  
ton Railroad & Navigation.

1507 National Realty Bldg., Tacoma, Wash-  
ton.

[Endorsed]: No. 2298. U. S. Circuit Court of Appeals, Ninth Circuit. Northern Pacific Railway Company, a Corporation et al., Plaintiffs in Error, vs. Cyrus A. Mentzer, Defendant in Error. Prayer for Reversal. Received Aug. 8, 1913. F. D. Monckton, Clerk. Filed Aug. 8, 1913. F. D. Monckton, Clerk.